



OXFORD

MEDIEVAL LAW  
*and the* FOUNDATIONS  
*of the* STATE

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ALAN HARDING

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## Preface

TRACING the growth of the State has become something of an historical industry, but the subject still needs definition. The history of the State has to be more than a history of strong government: it must show how an abstraction, a piece of metaphysics, came to dominate political consciousness as a thing not only believed to have real existence but loved for its promise of social order and hated for its threat of coercion. The power of the State rests on an idea which is unique in commanding both the levels of political thought discerned by Charles Taylor: the 'common-sense . . . pre-theoretical understanding of what is going on among the members of society' which is necessary for any political activity, and the high theory of the philosophers who criticize and systematize these working notions.<sup>1</sup> Graffiti urge the smashing of the same State about which Aquinas, Machiavelli, Hobbes, and Hegel theorized.

This book is primarily concerned with the 'pre-theoretical understanding' of what constituted a 'state' among rulers and ruled in the middle ages. It is not a history of state-theory and therefore makes little use of 'the learned laws', i.e. Roman and Canon Law, but an account of the complex of procedures and institutions perceived as constituting 'the state of the realm' in a medieval kingdom, and of how that perception developed into the early modern idea of the State. The introductory chapter does, however, seek to define the meaning of the word 'state' as it has been used in political thought back to the middle ages, and finds that its use in a theoretical way begins with Thomas Aquinas in the later thirteenth century. The following chapters trace the growth of systems of justice in the period before that time, when ideas of state must be looked for in the legislation and written *acta* of kings and their ministers. This is where 'state' appeared as part of a constellation of 'constitutional' words and notions, along with peace and custom, fief-holding and liberty, statute and 'the common good'. In the main part of the book the sources are therefore the volumes of charters and laws in such printed series as the *Monumenta Germaniae Historica*, the *Recueils des Actes* and *Ordonnances* of French rulers, the *Regesta Regum Anglo-Normannorum*, and the English *Statutes of the Realm*, along with the records of the administration of justice and the law-books which summed up a country's legal practice. The final chapters

<sup>1</sup> C. Taylor, 'Political theory and practice', in *Social Theory and Political Practice*, ed. C. Lloyd (Oxford: Clarendon Press, 1983).

return to the political theorists of the late medieval and early modern period who, in a climate of war and religious conflict, developed the legally defined 'state of the king and the kingdom' into a more modern concept of the State.

The study focuses on the systems of laws and courts in the kingdoms of France and England. Their foundations in Frankish and Anglo-Saxon justice (Chapter 2) might appear to have been shaken by the franchisal courts of feudal lords and communes of townsmen (Chapter 3), but French and English kings succeeded in integrating these into centralized polities (Chapter 5). Unlike the Italian cities on the one hand and the empire on the other France and England were both large enough to demand, and small enough to make possible, the centralized administration from which the notion of the State could develop. The 'organized peace' which was the bed-rock of judicial systems manifested itself most impressively in the German *Landfrieden*, but within an unwieldy empire these led to the crystallization of *Kleinstaaterei* (Chapter 4) rather than a pan-German state.

Politically, the state was a far more potent idea than the nation, because it signified a structure, which demanded continual criticism and reform. Chapter 6 shows how the notion of 'the state of the kingdom' was used by the critics of royal justice in the English parliament and French estates general (Chapter 6). In Chapter 7 the state in England and France is described as a legislatively ordered structure of 'estates', each estate defined by its legal rights and duties. The vicissitudes and understanding of the late medieval 'monarchical state' are the subject of Chapter 8, and the final chapter shows the continuity of the word and concept from a medieval and legal context into the politics of 'the modern state' (Chapter 9).

My thanks are due to the Universities of Liverpool and Edinburgh for appointing me to honorary fellowships on my retirement from full-time teaching, to the 'special collections' departments of the libraries of both universities, and above all to my wife Marjorie, without whose support and infinite patience the book would never have been completed.

A.H.

*Edinburgh*  
*January, 2001*

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## Abbreviations

<i>CJ</i>	<i>Journal of the House of Commons</i>
<i>Concilia</i>	<i>Mansi, Sacrorum Conciliorum Collectio</i>
<i>CRR</i>	<i>Curia Regis Rolls</i>
<i>DRTA</i>	<i>Deutsche Reichstagsakten</i>
<i>EHD</i>	<i>English Historical Documents</i>
<i>EHR</i>	<i>English Historical Review</i>
<i>LJ</i>	<i>Journal of the House of Lords</i>
<i>MGH</i>	<i>Monumenta Germaniae Historica</i>
<i>RP</i>	<i>Rotuli Parliamentorum</i>
<i>RRAN</i>	<i>Regesta Regum Anglo-Normannorum</i>
<i>SR</i>	<i>Statutes of the Realm</i>
<i>ST</i>	<i>Aquinas, Summa Theologica</i>
<i>TAmPhilSoc</i>	<i>Transactions of the American Philosophical Society</i>
<i>TRHS</i>	<i>Transactions of the Royal Historical Society</i>
<i>UP</i>	<i>University Press</i>

## Introduction. State: Word and Concept

YVES CONGAR<sup>1</sup> and Gaines Post<sup>2</sup> have shone light on the use of ‘status’ in the late Carolingian period and the high middle ages respectively, and Wolfgang Mager<sup>3</sup> and Paul-Ludwig Weinacht,<sup>4</sup> among others, have discussed the development of the *modernen Staatsbegriffe* from the late medieval period onwards. What is attempted here is an account of the application of the word in legal and administrative documents throughout the middle ages. Perhaps because they are ubiquitous and applied so variously to the condition of collectivities and to the standing of individuals, the medieval uses of the words *status*, *état*, *estate* have been played down by the scholars who have illuminated ‘the state tradition’, judging them to be employed ‘with little precision or consistency’ (H. F. Dyson),<sup>5</sup> or to be lacking ‘the distinctively modern idea of the State as a form of public power separate from both the ruler and the ruled’ (Quentin Skinner).<sup>6</sup> But particular uses of the word can hardly be dismissed because they fail to conform to preconceived notions of the thing. The problem is exactly how the idea of the state crystallized from uses of *status* by people who had no obligation to be precise and could not be consistent with a proper meaning yet to be established.

The teleology which is only interested in ‘state’ as it can be seen to evolve towards a presumed modern sense of the word has to be avoided, and so has the anachronism that arises from the apparent compulsion of present-day historians to use the term with its modern overtones

<sup>1</sup> Y. Congar, ‘Status Ecclesiae’, in *Essays in Medieval Law in Honor of Gaines Post*, ed. J. Strayer and D. E. Queller, *Studia Gratiana*, 15 (1972).

<sup>2</sup> G. Post, *Studies in Medieval Legal Thought: Public Law and the State, 1100–1322* (Princeton UP, 1964).

<sup>3</sup> W. Mager, *Zur Entstehung des modernen Staatsbegriffe* (Wiesbaden, 1968).

<sup>4</sup> P.-L. Weinacht, *Staat: Studien zur Bedeutungsgeschichte des Wortes den Anfängen bis ins 19. Jahrhundert* (Berlin, 1968).

<sup>5</sup> H. F. Dyson, *The State Tradition in Western Europe: A Study of an Idea and Institution* (Oxford: Martin Robertson, 1980), 25.

<sup>6</sup> Q. Skinner, *Foundations of Modern Political Thought*, 2 vols. (Cambridge UP, 1978), ii, 353–5; id., ‘The State’, in *Political Innovation and Conceptual Change*, ed. T. Ball, J. Farr, and R. L. Hanson (Cambridge UP, 1989), 90 ff.; cf. J. Tully, in *Meaning and Context: Quentin Skinner and his Critics*, ed. J. Tully (Cambridge: Polity Press, 1988), 17.

## 2 Introduction. State: Word and Concept

whatever period of the past they are talking about. Archaic words like polity seem to be no substitute when strong government is to be described, even though 'state' would not have been understood in anything like its modern sense at the time under discussion. In *Political Theories of the Middle Age* Otto Gierke related 'The State and Law' without attention to medieval usages of the word 'state', let alone to the ways they might have changed over time.<sup>7</sup> And in his magisterial study of *The Making of English Law* Patrick Wormald finds it necessary to say that King Alfred's ninth-century law-code marked the point where 'law became the aggressive weapon of a new state', though the word and the notion did not yet exist.<sup>8</sup>

The history of the State needs to keep in step with the changing uses of the word. But what is the modern concept to which those changing uses may be shown to lead? Skinner's definition of the State as 'a locus of power distinct from either the ruler or the body of the people' seems to create an unnecessary new entity deserving the attentions of Ockham's razor.<sup>9</sup> The potency of 'the state' derives from the fact that it can mean both ruler *and* people at the same time; that it signifies, as Sir Walter Raleigh already knew when he wrote *The Prince, or Maxims of State* in the early seventeenth century, 'the frame or set order of a Commonwealth, or of the Governors that rule the same, especially of the Chief and Sovereign Governor that commandeth the rest'.<sup>10</sup> The key to the history of the state is the development of the ambivalence which allows the word to signify both the ordered community which is to be loved and the regime which does the ordering and may be hated for its coercive power.

### STATE AS REGIME

The usual meaning of 'state' has come to be the regime 'that commandeth the rest', so that in the twentieth century the commonwealth requires to be distinguished by the hybrid term 'nation-state'.<sup>11</sup> This

<sup>7</sup> O. Gierke, *Political Theories of the Middle Ages*, tr. with introduction by F. W. Maitland (Cambridge UP, 1900: repr. 1951), 73 ff; 'state' may also appear unwarrantably in translations from medieval Latin: e.g. for *fiscus* in a translation of Walter of Guisborough's chronicle to refer to the agency confiscating clerical property for Edward I in 1296–7 (see *English Historical Documents*, iii. 1189–1327, ed. H. Rothwell, London, 1975, p. 225), and in the mid-15th cent. *Scotichronicon* by Walter Bower, general editor D. E. R. Watt, vol. 8 (Aberdeen UP, 1987), pp. 216.24 / 217.29 (book XVI, c.1), where *jura enim publica* is translated as 'the laws of the state'.

<sup>8</sup> P. Wormald, *The Making of English Law: King Alfred to the Twelfth Century*, i. *Legislation and its Limits* (Oxford: Blackwell, 1999), 429.

<sup>9</sup> Skinner, loc. cit.

<sup>10</sup> *Remains of Sir Walter Raleigh* (London, 1664), 2.

<sup>11</sup> *The Oxford English Dictionary* (Supplement, s.v. *nation*, §9) attributes the first use of 'nation-state' to J. R. Marriott in 1918.

sense of state was forged by Italian humanists who sought to understand the changes of regime of their cities, the *mutazioni di stato*, during the fourteenth and fifteenth centuries. In the England of the 1530s, during Henry VIII's political reformation, the *Dialogue between Pole and Lupset* by the Italian-educated royal chaplain, Thomas Starkey, weighed up the virtues of government of 'the state of the commonalty . . . by a prince, (or) by certain wise men, or by the whole multitude', concluding unremarkably that 'a princely state' was 'most convenient for our country'.<sup>12</sup> In the midst of the French wars of religion, Montaigne looked to Machiavelli's *Discourses on Livy* as an authority on *mutations* like those which were convulsing his country in the 1580s, though he proclaimed it folly to seek to upset the existing regime and to change 'the government of a few into a popular state [*le commandement de peu en un estat populaire*], or a monarchy into something else', in the hope of improving the situation.<sup>13</sup> Machiavelli's *Discourses*, printed posthumously in 1531, had analysed the regimes of the city-states in terms of three *stati*, *Principato*, *Ottimati*, and *Popolare*, and their perversions, *tyrannia*, *stati di pochi*, and *licenza*, showing how one could slide into another and how 'a free state' (*uno stato libero*) might emerge from the tumult.<sup>14</sup> Though born of the experience of renaissance Italy, and particularly of Florence, of which Machiavelli had been second chancellor from the fall of Savonarola in 1498 until the return of the Medici on the coat-tails of a Spanish army in 1512, both the *Discourses* and the *Prince* set their analyses within the political categories—monarchy (*principato*), aristocracy (*ottimati*), and democracy (*popolare*)—created by Aristotle in the fourth century BC and recovered in the thirteenth century by William of Moerbeke and Thomas Aquinas. William's translation of Aristotle's *Politics* around the year 1260 and St. Thomas's commentaries upon them, constituted a turning-point in the history of European political theory.<sup>15</sup>

In his discussion of government by one, a few, or many, in the treatise *De Regimine Principum* which he was writing within half a dozen years of William of Moerbeke's translation, and in the more detailed commentary on the *Politics* which he began around the year 1269, Aquinas used the Latin Aristotle's *monarchia*, *aristocratia*/*oligarchia*, and

<sup>12</sup> N. Rubinstein, 'Notes on the Word *stato* in Florence before Machiavelli', in *Florilegium Historiale*, ed. J. G. Rowe and W. H. Stockdale (Toronto, 1971), 315–16, 318; Thomas Starkey, *A Dialogue between Pole and Lupset*, ed. T. F. Mayer, Camden 4th ser. 37 (London: Royal Historical Society, 1989), pp. 36, 119, 120.

<sup>13</sup> M. de Montaigne, *Oeuvres Complètes*, ed. A. Thibaudet and M. Rat (Paris, 1962), 116–19.

<sup>14</sup> *The Discourses of Niccolò Machiavelli*, tr. L. J. Walker (London, 1950), i. 1–2, 252–62, 333–45, ii. 316.

<sup>15</sup> J. A. Weisheipl, *Friar Thomas D'Aquino: His Life, Thought and Works* (Oxford: Basil Blackwell, 1975), 380–1, for the chronology of Aquinas's works.

#### 4 Introduction. State: Word and Concept

*democratia* to refer to the various types of government individually: when he wished to refer to these political forms collectively, he employed such terms as ‘polity’, ‘dominion’, ‘power’, and ‘rule’ (*regimen*). It has been shown that it was not Aquinas himself, but Louis of Valence in the version of St. Thomas’s commentary which he published in 1492, who substituted the terms ‘state of the best’ (*optimatum status*) for *aristocratia*, ‘state of the few’ (*paucorum status*) for *oligarchia*, and ‘popular state’ (*popularis status*) for *democratia*, having found the new terms in Leonardi Bruni’s early fifteenth-century translation of the *Politics*.<sup>16</sup>

Nevertheless it seems to have been Aquinas who took the simple but momentous step which would focus the understanding of Italian city politics, and subsequently the politics of the kingdoms of the rest of Europe, on the ‘state of the regime’ (*status regiminis*). He formulated the concept of the state as ‘the set order of the governors’ at the heart of every stable commonwealth—the general concept which was necessary before the name could be attached to a particular form of government in Aristotle’s scheme. In ‘the first part of the second part’ of his *Summa Theologica*, which is probably contemporaneous with the commentary on the *Politics*, Aquinas discusses the relationship between the Law of the Jews in the Old Testament and the New Law of Christ: how much of the Old Law is still valid? He concludes that the judicial precepts binding the Jews lost their force with the coming of Christ and ‘the changing of the state of that people’ (*mutato statu illius populi*):

The judicial precepts which men have instituted are of permanent force, as long as the state of regime endures [*manente illo statu regiminis*]. But if the city or the active part of it comes under another regime [*civitas . . . ad aliud regimen deveniat*], the laws must change. For the same laws are not appropriate in a democracy, which is the power of the people, and in an oligarchy, which is the power of the rich; as the Philosopher makes clear in his *Politics*.<sup>17</sup>

Aquinas’s ideas were carried to the Italian cities by his Dominican pupils, Remigio di Girolami and Ptolemy of Lucca, and his scholastic abstraction of Aristotle’s different constitutions turned out to be a perfect instrument for understanding the volatile chemistry of city politics: the transformation of one regime into another under the strains of the party warfare of Guelf and Ghibelline and of economic and demographic growth.<sup>18</sup> Already in the early years of the fourteenth

<sup>16</sup> *Sancti Thomae de Aquino Opera Omnia, cura et studio Fratrum Praedicatorum*, xlviii. *Sententia Libri Politicorum* (Rome, 1971), pp. A8, A17–20, A144–48; R. M. Spiazzi, in his edition *S. Thomae Aquinatis in Libros Politicorum Aristotelis Expositio* (Turin and Rome, 1951), 138–9, mistakenly attributed these uses of *status* to Aquinas himself.

<sup>17</sup> Aquinas, *Summa Theologica*, 5 vols. (Madrid, 1961–5), ii. 720–1 (*Prima Secundae*, quaestio 104, article 3, conc. and ad.2).

<sup>18</sup> Skinner, *Foundations of Modern Political Thought*, i. 52, 54–5, 59, 82, 144–5; Georges de Lagarde, *La Naissance de l’esprit laïque*, 2nd edn. (Louvain and Paris, 1958), ii. 110;

century Aquinas's admirer Dante could write (in the *Inferno*) of the town of Cesena in the Romagna as suspended 'between tyranny and a free state' (*tra tirannia e stato franco*); and the Florentine historian Giovanni Villani called the constitutional reforms of 1293 which attempted to curb the influence of the magnates a *mutazione di stato*. Both Villani and Leonardo Bruni, who described the results of the Ciompi revolt in 1378 as *status reipublicae mutatio*, were using the terminology of Aquinas along with the argument of book V of Aristotle's *Politics*, which discusses the 'transmutation' of constitutions.<sup>19</sup>

#### STATE AS COMMONWEALTH

But talk of the state of the regime has always been in relation to that wider community of which the regime is the focus. As historically important as the idea of the organic nation is that of the political ordering of ranks or 'estates' into 'the state of the commonwealth': a benign vision perfectly represented by H. A. L. Fisher's description of the outcome of the Norman conquest of England.

. . . the foundations were laid for the construction of a free and well-governed state. Normans and English intermarried. Under the shelter of a government strong enough to keep the baronage in its place a rural middle-class, that valuable feature which most sharply distinguishes medieval England from its continental neighbours, maintained itself in rude comfort and respectability and in due course of time became a principal pillar of constitutional government in our island.<sup>20</sup>

The State which Hegel made the subject-matter of history is a much more dynamic 'maelstrom of external contingency and the inner particularity of passions, private interests and selfish ends, abilities, and virtues, vices, forces and wrong'; society was held together by the 'fundamental sense of order which everybody possesses', but 'the origin of the state is domination on the one hand, instinctive obedience on the other', because 'obedience and force, fear of a ruler, is already a connection of wills'.<sup>21</sup>

C. T. Davis, 'Roman Patriotism and Republican Propaganda: Ptolemy of Lucca and Pope Nicholas III', *Speculum*, 50 (1975), 411-33; N. Rubinstein, 'Politics and Constitution in Florence at the End of the Fifteenth Century', in *Italian Renaissance Studies*, ed. E. F. Jacob (London, 1960), 160.

<sup>19</sup> Dante, *Inferno*, canto 27, l. 54; Rubinstein, 'Notes on the Word *stato*', p. 316; L. Bruni's translation of the *Politics*, bk. 1, ch. 9: f. 31 in the edition of the *Politics and Economics*, edited by Lefèvre d'Étaples and printed by H. Estienne (Paris, 1511); H. Baron, *The Crisis of the Early Italian Renaissance*, 2nd edn. (Princeton UP, 1966), for Bruni's importance.

<sup>20</sup> H. A. L. Fisher, *History of Europe* (London, 1936), 214.

<sup>21</sup> G. W. F. Hegel, *Philosophy of Right*, tr. with notes by T. M. Knox (Oxford: Clarendon

## 6 Introduction. State: Word and Concept

In fact the Aristotelian analysis of regimes assumed from the first competition for power between social groups within territorial boundaries. It is for this reason that some references to state as regime appear ambiguous and capable of signifying both regime and commonwealth. Machiavelli was led to use *stati* for whole countries when he applied the analysis of regimes to the great territorial principalities of his own time: when, for instance, he contrasted Turkey, which he described as governed by a single ruler and his servants and therefore difficult to conquer but easy to hold, with France, where the barons also had territories and subjects and the state was easy to capture piecemeal but difficult to hold.<sup>22</sup>

It was in territorially extensive communities such as France, England, and eventually the new United States, not in the Italian cities, that the relationship of the regime to the wider state would come to be seen as problematic. Montesquieu<sup>23</sup>, Adam Ferguson in eighteenth-century Scotland,<sup>24</sup> and Alexander Hamilton in a newly independent United States<sup>25</sup> all saw a limit to the geographical size of a state which could operate as a democracy. There was, perhaps, 'a certain natural extent, within which the passions of men are easily communicated from one, or a few, to the whole; and there are certain numbers of men who can be assembled, and act in a body'. The eighteenth-century *philosophes*' concern with the territorial limits of a viable political state was overshadowed, however, by their growing conviction that human society as a whole developed through successive *states* or stages: a process which has been termed 'legal evolution', because each stage was believed to be marked by a transformation of laws. In his *Spirit of the Laws*, published in 1748, Montesquieu explained how the 'law in general' which 'governs all the peoples of the earth' was fitted by positive law-making to the character of a particular people and the climate and terrain of their country, to produce the 'civil state'. (We are told, for instance, how

Press, 1952), 279; id., *Reason in History*, tr. R. S. Hartman (Indianapolis, 1953), 60; cf. R. G. Collingwood, *Essays in Political Philosophy*, ed. D. Boucher (Oxford: Clarendon Press, 1989), 92–113, for the state as 'not a substance but an activity'—the political activity of everyone in society which is concerned to provide a framework of law and order and civil peace.

<sup>22</sup> Machiavelli, *The Prince*, ed. Q. Skinner and R. Price (Cambridge UP, 1988), 15–16 (ch. 4).

<sup>23</sup> Montesquieu, *De l'esprit des lois*, 2 vols., ed. V. Goldschmidt (Paris: Garnier-Flammarion, 1979), i. 127–8 (bk. I, ch. iii), 177 ff. (bk. V, ch. viii), 269 (bk. IX, ch. vi), 273 (bk. X, ch. ii), 293–4 (bk. XI, chs. v–vi), ii. 275 ff. (bk. XXVIII, ch. xxxvii), 291 ff. (bk. XXIX).

<sup>24</sup> Adam Ferguson, *An Essay on the History of Civil Society* 1767 (Edinburgh UP, 1966), 220.

<sup>25</sup> *The Federalist Papers*, introduced by C. Rossiter (New York: New American Library, 1961), no. 9, p. 73; J. R. Pole, 'The Politics of the Word "State" and its relation to American Sovereignty', *Parliaments, Estates and Representation*, 8 (1988); P. Stein, *Legal Evolution: The Story of an Idea* (Cambridge, 1980).



St. Louis, the great thirteenth-century king, adapted Roman law to the needs of France, in his *Établissements*.)

Once more it is Aquinas who gives the first theoretical recognition of a basic political reality. The most obvious source of his concept of the *status regiminis* is the *status regis* politicians attributed to kings. Of course as a schoolman relying on ancient authorities he does not attach his 'state of the regime' nor his concept of the wider state of the commonwealth to any thirteenth-century kingdom, but to the kingdom of the Jews as it developed through biblical history. Yet he joins commonwealth to king in the way that, as a teacher in Paris and privileged observer of the rule of St. Louis, he must have known a contemporary kingdom was joined to its ruler. The context of his references to the state, it will be remembered, is a discussion of the relationship of the Old Law to the New. He argues that the moral precepts of Old Testament law retain their validity for Christians under the New Law of the Gospel; and that even the ceremonial precepts, of which the literal or historical purpose had been to keep the Jews from worshipping idols, still have meaning for us, in that they prefigure the relationship of man to God through Christ. The judicial precepts, the working laws, were specific to the Old Testament community, however, and intended only 'to order the state of the people of the Jews according to justice and equity'. Thus they have no authority among Christians. Yet even the judicial precepts may have something to teach later ages, in that they set out 'the whole state of that people', which 'prefigures'—one might say 'provides a model for'—subsequent states.<sup>26</sup>

For Aquinas the essential nexus between the regime and the people was legislation. He understands that the legislative function will be exercised in different ways in different communities, and that this indeed is how a monarchy, with its 'constitutions of princes', is distinguished from an aristocracy, in which law is made by the decrees of a senate and the opinions of an elite of jurists, and from a democracy, which legislates by plebiscite. Not only the legislative process but also the content of the law, and therefore the character of the wider state, is determined by the nature of the sovereign power. 'If a city comes under another regime, its laws must change. For the same laws are not suitable to a democracy, in which power belongs to the people, and in an oligarchy, in which power is of the rich . . . So when the state of a people changes (*mutato statu illius populi*), the judicial precepts must change.'<sup>27</sup>

For the idea that human societies, Christendom as a whole, changed their states, Aquinas could have drawn upon both sacred history and Roman jurisprudence. When he argues that there cannot be a third

<sup>26</sup> *Summa Theologica* [ST], *Prima Secundae* [I-II], q. 104, art. 2.

<sup>27</sup> ST I-II, q. 95, art. 4, conc.

## 8 Introduction. State: Word and Concept

*status mundi* after the state of the New Law, though by the grace of the Holy Ghost that law may be kept more perfectly, he was adapting a trinitarian scheme of history propounded most recently by Abbot Joachim of Fiore, who died in 1202. But it was really as one of the ‘post-glossators’ of Roman law that Aquinas wrote his lengthy treatise on law in the *Prima Secundae* of his summa of theology—as the first, indeed, of the jurists who moved on from the glossing of the text of the *Corpus Juris Civilis* to the writing of coherent books of their own. He would have known Ulpian’s dictum in the *Digest: Publicum Jus est, quod ad statum rei Romanae spectat*: that there had been ‘a state of Roman affairs’ (= *res* as in *respublica*) enshrined in a law which governed public ceremonies and the magistracy. He might have read Justinian’s constitution *Tanta*, which promulgated the just completed *Digest* of Roman law on 16 December 529 and proclaimed that God had ‘set the Imperial dispensation at the head of human affairs’ precisely to cope with novel contingencies. Human society was created and sustained by acts of law-making. Aquinas goes to some pains to show that even the Eternal Law of God has its source in legislation proceeding from His ‘reasonable will’, even if a law existing from eternity cannot have been promulgated in the normal way. Similarly, human laws proceed from the reason and will of the subordinate governors who derive their plan of government from the Supreme Governor, but have always to be adapting it to the changing states of their particular societies.<sup>28</sup>

His assertion that any rational individual is legislating, ‘being provident for himself and others’, when he applies the Natural Law to his own particular circumstances, and his description of emergencies, e.g. threats of military attack or the starvation of one’s family, when the ruler or an individual may tax or steal on the principle that ‘necessity knows no law’, show that Aquinas’s law-making is a practical exercise. On those occasions that he quotes Justinian’s *Digest* directly, it is to emphasize that only a manifest ‘common utility’ justifies changing human laws. The force of law depends on its stability and rootedness in the customs of the community.<sup>29</sup> But in the late twelfth and thirteenth centuries kings were taking it upon themselves to guard and purge these customs, and to mould the societies of their countries by positive legislation. In the 1250s the kings of both France and England begin to talk of the purpose of this law-making as to correct ‘the state of the realm’.<sup>30</sup>

<sup>28</sup> ST I-II, q. 91 art. 2, conc., 104, art. 3 ad 2., q. 106, art. 4; for Joachim’s *status* see M. Reeves and B. Hirsch-Reich, *The Figurae of Joachim of Fiore* (Oxford: Clarendon Press, 1972), 10–11, 164–7; J.-M. Aubert, *Le Droit romain dans l’oeuvre de Saint Thomas*, Bibliothèque Thomiste, 30 (Paris, 1955); *Digest*, Preface and 1.1.2.

<sup>29</sup> ST I-II, q. 97, art. 2, conc.

<sup>30</sup> *Les Établissements de Saint Louis*, ed. P. Viollet, 4 vols. (Paris, 1881–6), ii. 1; *Ordonnances des Roys de France*, i. 67, 76; *Documents of the Baronial Movement of Reform*

In 1284 Edward I king claimed divine providence as his guide for the new order he decreed (*statuendum decrevimus*) for conquered Wales,<sup>31</sup> echoing Aquinas's dictum about subordinate governors who derive their plan of government from the supreme governor. By the second half of the thirteenth century there existed an idea of the territorial state structured by law which could be used by practical administrators as well as theologians. The following chapters will trace the building of a model of the State out of the systems of legal procedures and law-courts, acts of legislation, and definitions of public crime, private property and injury, which had begun to appear in the Germanic kingdoms that succeeded the Roman Empire in the West; and show how it reached completion as an arrangement of legally differentiated estates that included the king and embedded the regime in the commonwealth.

*and Rebellion*, selected R. E. Treharne and ed. I. J. Sanders (Oxford: Clarendon Press, 1973), 72–5, 294–5, 308–9; A. Harding, 'Legislators, Lawyers and Lawbooks', in *Lawyers and Lawmen*, ed. T. M. Charles-Edwards, M. E. Owen, and D. B. Walters (Cardiff: U. of Wales P., 1986), 246–53.

<sup>31</sup> SR i. 55.

## CHAPTER TWO

# Frankish and Anglo-Saxon Justice

THE BARBARIAN kingdoms that succeeded the Roman empire in the west developed into states of a new sort, between the empires and the city-states of the ancient world. Though it generated a body of law on which all subsequent legal systems would draw, and might even be called ‘the Roman state’,<sup>1</sup> the vast military empire centred on the city of Rome ‘was no more than a changing patchwork of control’ of innumerable local communities.<sup>2</sup> The coherent societies of early Europe were the separate peoples like the Germans, whose institutions caught the imagination of Tacitus. In the long term these held the possibility of integration into a communal authority far stronger than the Romans’ thinly-spread military power. By individual charters of grant and administrative orders to their servants, rather than by general edict, the rulers of the barbarian kingdoms developed a legal order based on the allotment of property rights, the granting of ‘peace’ to the lands and their inhabitants, and courts and procedures for the settlement of property disputes and the punishment of obdurate peace-breakers. It was in the rhetoric of such ‘acts’ (*acta*) of the kings of the Franks that a notion of ‘the state of the kingdom’ made its appearance.

## THE FIRST COURTS

Tacitus paints a picture of assemblies of all the freemen of German tribes, meeting at fixed times to settle their affairs under the persuasion (rather than at the orders) of their chiefs, to hear accusations and to apportion punishments for crimes: hanging for treason and desertion; smothering in bogs for cowardice, with hurdles piled on the bodies to hold them down; and for lighter offences such as homicide, assault, and larceny, the forfeiture of horses and cattle—partly as compensation to the injured man or his kin, partly as a fine to the king or city the authority of which had been transgressed. Leading men, so Tacitus says,

<sup>1</sup> See H. Goelzer in *Bulletin du Cange*, ii. 39–40, for an isolated use of *Romanus status* by Tertullian in the early third century.

<sup>2</sup> F. Millar, ‘The Mediterranean and the Roman Revolution: Politics, War and the Economy’, *Past and Present*, 102 (1984), 18.

were chosen in the tribal assemblies to dispense justice throughout the *pagi* (cf. the French *pays*, inhabited by *paysans* or 'peasants'), the country districts which the Romans believed to be the units of German administration, where they gave their judgments with the concurrence of a large body of assessors.<sup>3</sup> However imaginative Tacitus's description, it seems likely that the character of medieval law-courts was set by the introduction into barbarian assemblies—it must have been under the influence of the Church—of the Roman feeling for correct procedure. The judicial power of the Roman magistrate and German communal authority fused together in the 'cities' (*civitates*) of Frankish Gaul, from which there begin to survive records (*noticiae*) of pleas in the municipal courts (*curiae*). But true cities were few in the lands the Franks invaded. It was into tribal territories that were introduced the officials known as *defensores civitatum*, whose declared purpose was to 'defend' the interests of the lesser landholders. By the fifth century the choice of these magistrates was in the hands of local notables, including bishops and clergy.<sup>4</sup>

The cases that were recorded (the ones on which a consistent law could build) concerned property, because the record preserved the right. A collection of legal forms made in the eighth century still includes 'a judicial contest or complaint' (*contestaciuncula seu plancturia*) about property in 'the *pagus* and town' of Clermont, which was heard by 'that illustrious man the *defensor*' along with 'the worthy men who conduct the public courts'.<sup>5</sup> At Bourges also, the registration of the willing of land to a monastery before the *defensor* 'or the public court' (*vel curia publica*) was worth preserving amongst 'the municipal acts'. The making of gifts or testaments 'according to the custom of the Romans' involved the entering of the deeds in the town books. There is reference at Bourges and elsewhere to 'professors' and notaries who recite the deeds and write them down for subscription by the *defensor* and the whole court. Decisions—that the books be opened and deeds read—are recorded as pronounced by the *defensor* and the body of the court.<sup>6</sup> A *principalis*—a nobleman or chieftain—may act along with them, as at Angers 'in the fourth year of the reign of our lord King Childebert [514–15]'.<sup>7</sup>

<sup>3</sup> Tacitus, *De Origine et Situ Germanorum*, ed. J. G. C. Anderson (Oxford UP, 1938), 7–8 (c. 13).

<sup>4</sup> Code, 1.55; A. H. M. Jones, *The Later Roman Empire*, 3 vols. (Oxford: Blackwell, 1964), i. 479–84, ii. 727.

<sup>5</sup> *Formulae Merovingici et Karolini Aevi*, ed. K. Zeumer, MGH Legum Sectio 5 (Hanover, 1886), 28; cf. *ibid.* 4.[line]5, 29.15, 151.10, 169.34, 202–3, 209.

<sup>6</sup> *Ibid.*, 29, 97.15, 137.4, and for the 'professor', 98.10 and 209.2; on *gestae*, the judicial 'acts' by which real property was transferred, see F. C. von Savigny, *Geschichte des Römischen Rechts*, 2nd edn., 6 vols. (Heidelberg, 1834–50), i. 107–14.

<sup>7</sup> *Formulae*, 4.5, and cf. 136.25; for *principales* and the *ordo curiae*, see Jones, *The Later*

The preoccupation of Roman law with the safeguarding, inheritance and transfer of family property (property in slaves an important part of it) had been intensified when the empire became Christian. Donations to the clergy were encouraged, and the endowment began which was to make churches the great landowners of early medieval Europe and the pioneers of estate-management. Such practices as the granting of a dowry by the bride's family to the husband on marriage were important to barbarian society and as fruitful a source of argument, as they had been to the Romans. The courts of the Frankish *civitates* continued to follow the requirements that land should be transferred by public act and written deed which had been enacted by the Emperor Constantine.<sup>8</sup>

The barbarian kings, instructed by the Church, had reason to try to keep Roman law in operation. But change came inevitably from the ending of imperial direction, the economic decline of the West and with it the disappearance of such civic life as there had been, and the intermingling of the Germanic newcomers with the existing population. Roman law, which the clergy of whatever race claimed for their own, was in many details incompatible with barbarian custom, itself varying from people to people. As late as the middle of the ninth century it could still be said that five men together in the same room might each follow his own law. The practical consequence of this 'personality of law' was that disputes were more easily settled by customary forms of arbitration in local assemblies than by judgments which attempted to apply a general code of law.<sup>9</sup> Nevertheless, the barbarian rulers did take from the Romans a real authority to make law and give justice—this as protectors of the property rights of churches and the nobility. The German king was the head of a settler society and much nearer to his people than an emperor in Rome could ever have been: and after his conversion he was more susceptible to ecclesiastical influence: all of which emphasized his duty to control the disposition of lands. For his part, the king expressed in his charters or 'acts' not at first a concern for the *status* of his kingdom, but for its *stabilitas*: its mere ability to 'stand' at all.<sup>10</sup>

*Roman Empire*, ii. 760–1, 774, and Savigny, *Geschichte des römischen Rechts*, i. 40, 81–3; the *Formulae* tell us about the forms of royal justice: for a wider view of the realities of dispute settlement, see the articles in *The Settlement of Disputes in Early Medieval Europe*, ed. W. Davies and P. Fouracre (Cambridge UP, 1986).

<sup>8</sup> E. Levy, *West Roman Vulgar Law: The Law of Property*, Memoirs of the American Philosophical Society, 29 (Philadelphia, 1951), 138 ff., 170 ff.

<sup>9</sup> P. Vinogradoff, *Roman Law in Medieval Europe*, 3rd edn. (Oxford UP, 1961), 24–6.

<sup>10</sup> J. M. Wallace-Hadrill, *The Long-Haired Kings* (London, 1962), 213 ff., on the beginnings of Frankish law-making; D. Ganz and W. Goffart, 'Charters earlier than 800 from French collections', *Speculum*, 65 (1990); for the emphasis on *stabilitas*, *Diplomata regum Francorum e stirpe Merovingica*, ed. K. A. F. Pertz, MGH Diplomata in Folio 1 (Hanover, 1872), 29.14; *Formulae*, 46.20, 171.25, 200.25.

GRANTS OF PROPERTY AND PROTECTION

The greatest of the formularies, the early seventh-century 'formulary of Marculf' is divided into two parts, of which the second contains fifty-two *cartae pagenses*, the deeds or 'acts' of local landowners. Lords grant lands to churches, sometimes being given back life-leases of these or other estates. Husbands and wives settle lands on each other to provide for the longer-lived of them, and fathers make over lands to their sons. Favoured grandsons, or strangers, are adopted as heirs. A daughter is given an equal share in a paternal inheritance along with her brothers, against 'the ancient but reprehensible' custom of the Franks. Kinsmen reach an agreement about the inheritance of family lands, without the compulsion of a court (*non a iudiciaria potestate coacti*). Dowries are given and wills made according to Roman law, and feuds are settled by a formula providing for the payment of compensation for homicide under the witness of churchmen and nobles. Several items relate to serfdom and the sale or emancipation of serfs. There are letters of divorce (*libelli repudii*), of commendation to bishops and abbots, and of Christmas and Easter greetings to fellow-bishops and kings. Besides forms for the entry of grants in the municipal books and for the reading of grants and wills 'according to the customs of the Romans', there is one to authorize a person to act as attorney for a litigant in a property case heard in the royal palace.<sup>11</sup>

This second part of Marculf's formulary harks back to Roman forms: the first part shows that the barbarian kings had themselves come to provide a sanction for property arrangements, and were moulding Roman procedures into a new judicial and political order. Royal charters were often sought not as gifts of land but as grants of the political protection of one's property and the judicial privileges within them which only the king could confer. The first 'style' of all is in fact a bishop's grant of 'a privilege of liberty' to an abbey, which the king then sanctions in the second style. The bishop promises not to intervene in the affairs of the monastery except to do the things which only he can: to confer holy orders and bestow holy oil, consecrate altars, and install a new abbot after his free election by the community—all of which he must do without payment. The king's grant is addressed both to the fathers of the Church and to his count and other agents, now and in the future. Bishops and archdeacons and their subordinates are forbidden to exercise any powers in the monastery beyond those specified; and no 'judicial power' (*iudiciaria potestas*) is henceforth to hear cases (*causas*)

<sup>11</sup> *Formulae*, 70–105 (Marculf II, nos. 1–15, 17, 18, 22, 28–50); cf. Wallace-Hadrill, *Long-Haired Kings*, 4–7.

within the lands granted to the community, which it is to possess 'under all immunity'. The third form is a grant of 'royal immunity' to a bishop, so that no 'public judge' shall operate within the episcopal lands; and the essence of the fourth, a 'confirmation of immunity', is likewise exemption of church lands from public jurisdiction.<sup>12</sup>

Though some of the royal charters are grants from the king's own estates, the booking of land—that is the setting-down of rights over it in what would come to be called 'land-books' in the contemporary Anglo-Saxon kingdoms—was essentially a political act. The grants of land and immunity in the first part of Marculf's formulary stand along with orders to bishops to promote worthy men to be the archpriests of towns, which the king issues in his function of ministering to and governing everything; and with royal appointments to the judicial dignity of count, duke, or patrician, who are bidden to rule the people in their *pagi*, Franks, Romans, Burgundians, or people of other nations, according to their own laws and customs.<sup>13</sup> In this first part we are also shown how a man becomes a royal 'antrustion' and has allotted to him the appropriate wergild which must be paid for his killing; how a royal servant is protected from law-suits while away on the king's business; and how royal protection (*mundeburdium*) is granted to a particular church and all its property and servants.<sup>14</sup>

An edict of Chlothar II in 614 makes clear that grants of immunity or 'liberty' conferred or confirmed landlords' positive responsibility to impose peace and discipline within their lands, and the authority thus granted to the most favoured ecclesiastical landlords was the more permanent for including the right to dispose of the lands they received to their best advantage.<sup>15</sup> In these charters kings were attempting to shore up their kingship. So, communities of monks were endowed by the king, and the communities which his predecessors had established were preserved 'in quiet order' (*quieto ordine*), in order that they might pray 'for the stability of the kingdom'.<sup>16</sup> For this reason, too, it was seen as a royal duty to preserve for all time coming what in England was called 'book-right' (since it was conveyed by 'land-books').<sup>17</sup> The king

<sup>12</sup> *Formulae*, 39–45 (I, nos. 1–4); for other grants of immunity, see 53–5, 201; and *Diplomata Merovingica*, 19–20, 30 (no. 31), 35 (38), 36 (40).

<sup>13</sup> *Formulae*, 46–8, 52–3 (Marculf, I, 6–8, 14–15).

<sup>14</sup> *Ibid.* 55, 57–8 (Marculf, I, 18, 23, 24).

<sup>15</sup> *Capitularia Regum Francorum*, ed. A. Boretius and V. Krause, MGH Legum Sectio 2, 2 vols., (Hanover, 1883–90), i. 22.25; M. Kroell, *L'Immunité franque* (Paris, 1910), 76–8, 206; A. C. Murray, 'Immunity, Nobility, and the Edict of Paris', *Speculum*, 69 (1994).

<sup>16</sup> *Formulae*, 151.3, 307.5; *Diplomata . . . Merovingica*, 4, 20.25, 29.10 and 35, 30.49, 35.25; *Pippini, Carlomanni, Caroli Magni Diplomata*, ed. A. Dopsch, J. Lechner, M. Tangl, and E. Mühlbacher, MGH Diplomata Karolinorum 1 (Berlin, 1906), 20.20, 175, 204.15 and 35, 245.1; Wallace-Hadrill, *The Long-Haired Kings*, 241 ff.

<sup>17</sup> *Formulae*, 18.15, 54.25, 97.5, 137.20, 148.5, 208.15, 275.1, 289.5, 305.15, 306.5; *Diplomata . . . Merovingica*, 4, 6.20, 20, 21.25, 22.10, 25.40, 29.10 and 35, 30.45, 35.25,



was expected to be ready to confirm the rights of those whose title-deeds were stolen or destroyed in war, and his first business on his accession was to confirm the charters of previous rulers granting liberties to churches: a confirmation which would eventually be extended to the traditional liberties of the lay barons and the people at large.<sup>18</sup> Kings saw that it pertained *ad stabilitatem regni nostri* to confirm the grants of their predecessors to holy places; monks prayed for the kingdom's stability; lay as well as ecclesiastical landlords preserved it by their policing and judging in the lands granted to them.<sup>19</sup> In 814, the Emperor Louis the Pious granted liberty and protection to Spanish refugees from the Saracens who had settled in his kingdom, and in 844 Charles the Bald confirmed to them immunity and the right to be judged in their own courts by their own customs, 'for the lasting and prosperous stability of the kingdom given us by God'.<sup>20</sup>

The development of grants of *mundeburdium* or protection completed the ordering of the kingdom by charters of immunity. The two types of grant (protection and immunity) multiplied and fused together in the reign of Louis the Pious (814–40). A collection of *Formulae Imperiales* emanating from Louis's court show how the beneficiaries' lands and goods, and all their men wherever they went on their lords' business, could be taken 'under the defence of the king's protection and immunity', to be possessed 'in quiet order . . . free from disturbance by judicial power'.<sup>21</sup> The Carolingian dynasty had built its authority to a large extent upon its patronage of churches which it took under its 'word of protection, immunity and *mundeburdium*' and forbade its own officials to interfere with. A grant of protection to a bishop and the people of his diocese might include the right to their own law and custom and thus create a self-governing community, as did Charlemagne's to the bishop of Chur (in modern Switzerland) in 772/4.<sup>22</sup> The protection of servants journeying on their lords' business

36.30; F. Liebermann, *Die Gesetze der Angelsachsen*, 3 vols. (Halle, 1903–16), i. 74–5 (41), ii. 325 ('Bocland', 7); H. Brunner, *Zur Rechtsgeschichte der römischen und germanischen Urkunde* (Berlin, 1880), 190 ff.; F. M. Stenton, *The Latin Charters of the Anglo-Saxon Period* (Oxford UP, 1955), 14; Eric John, *Land Tenure in Early England* (Leicester UP, 1960), 10; G. Tessier, *Diplomatique royale française* (Paris, 1962), 68–9.

<sup>18</sup> *Formulae*, 63–5, 150–1, 296 (no. 15), 307.5 (28), 308.10, 311 (32), 323 (48); *Capitularia*, i. 32.15, 36.33, 199.27, 262.45, 289.29, 326.31, ii. 92.14, 268.17, 333.26, 376 (no. 288), for the wholesale confirmation of immunities by Frankish kings from Peppin in 754/5 to Eudes, the first non-Carolingian king in France in 888; *Pippini etc. Diplomata*, 20, 26, 112; Tessier, *Diplomatique*, 61–6; A. Harding, 'Political Liberty in the Middle Ages', *Speculum* 55 (1980), 433–4.

<sup>19</sup> *Formulae*, 200.25, 261.35, 499.35; *Pippini etc. Diplomata*, 175.

<sup>20</sup> *Capitularia*, i. 261–3, ii. 258–60; Kroell, *L'Immunité franque*, 206.

<sup>21</sup> *Formulae*, 296 (no. 15), 306–7 (28), 311 (32), 323 (48), especially 307.5 and 308.10; Tessier, *Diplomatique*, 61–6; Harding, 'Political Liberty', 433–4.

<sup>22</sup> Examples in *Pippini etc. Diplomata*, 20 (no. 14), 26 (17), 112 (78).

gave rise to the most familiar of personal privileges, and one of great economic importance: the protection and freedom from tolls bestowed on groups of merchants. Joining it to immunity (a privilege exercised within a specific territory) made the protection 'real' as well as personal; and the comprehensive protection of lord, estate, and servants gave the medieval lordship its coherence and autonomy.<sup>23</sup>

#### PLEAS BEFORE THE KING

Legal rights were created by specific grants, and the procedures of royal justice also began from charters granting land, immunity, and protection. Charters were essential instruments of rule for all the Germanic kings. The *Liber Iudicum*, a law-book of the Visigoths in Spain which was probably issued in 654, emphasized the force of written contracts and deeds (*pacta vel placita*) and the iniquity of breaking or tampering with them. There were special penalties for falsifying royal orders and using them in court: it sounds as though litigants were regularly producing forged summonses (*falsa commonitoria*) in the names of kings or judges.<sup>24</sup> For the Franks, Marculf's 'royal charters' include several *indicula*—letters the function of which was to institute a legal hearing. Thus no. 29 relates that a vassal has 'entered the king's presence' and 'suggested' the unfair withholding of some right and his failure to obtain justice from the withholder; 'if this is so' (*si taliter agitur*), the defendant is 'to make amends according to law'; and 'if he will not and has something to say on the other side', he is to answer the complainant in the king's presence on a given day, 'warned by this letter' (*per hunc indecolum commoniti*). The assumption that the procedure will bring the parties to court is clear from the heading of no. 28 (*Carta audientiale*), an order which is significantly not addressed to the defendant or his lord but to the king's official, the count of the *pagus*: in this case land has been withheld 'by force', and the defendant is to be placed under sureties to appear before the king on a certain day, if the matter has not by then been settled 'rightly' before the count (*ante vos recte non finitur*).<sup>25</sup>

Heinrich Brunner noticed well over a century ago the resemblance of the Frankish royal *indicula* to the writs of right described by 'Glanvill' in the late twelfth century, which stand at the beginning of the forms of

<sup>23</sup> *Formulae*, 311 (no. 32), 323 (48).

<sup>24</sup> *Los Códigos españoles*, 12 vols. (Madrid, 1847–51), i. 14, 53–4 (Lib. II, tit. v; Lib. VII, tit. v).

<sup>25</sup> *Formulae*, 59–61, 197 (nos. 27, 28); *Die Gesetze der Langobarden*, ed. F. Beyerle (Weimar, 1947), 90 (224), 98 (243), 278 (115), 348 (8); P. Classen, 'Kaiserreskript und Königsurkunde', part. ii, *Archiv für Diplomatik*, 2 (1956), 32 ff., 78–86.

action of the English common law. But no direct influence need be sought: in a similar context of property transactions by charter between king and landlords, enforced by the same sort of territorial official (the Latin term for the Anglo-Norman sheriff was *vice-comes*, 'viscount'), similar procedures might be expected to develop. By the early eleventh century, English kings were sending writ-charters to counties, which ordered the thegns to see that the grants were fulfilled and hear disputes that might arise from them.<sup>26</sup> Legal processes grew out of the confirmation by kings of the property-rights of churches and nobility, by charters which (though given to the beneficiary) were addressed to the king's 'agents, present and future', who would have the job of enforcing them.<sup>27</sup> At the same time as the diploma was handed over, special orders might be directed to officials, repeating the terms of the immunity, laying down the special fine of 600s. for its infringement, and perhaps ordering that disputes about it be sent before the king.<sup>28</sup> The authentication of charters by the king's hand and seal, and their witnessing by members of the king's entourage, were also intended to ensure that land-rights remained stable and 'inviolable for the future'; and conversely they influenced the further evolution of royal authority.<sup>29</sup> The sealed charter published abroad the king's authority, but the witnesses introduced the notion of consent by the magnates to what were in fact the king's most important political acts. Royal orders defined the economic as well as the social power of the aristocracy: for instance, both Merovingian and late medieval Scottish kings had a form of letter *de aqueductu*, to protect the beneficiary's watercourse.<sup>30</sup> The charters of the Carolingian kings confirmed the personal liberty (*statum libertatis*) of individuals when it was threatened by officials; and the corporate

<sup>26</sup> H. Brunner, *Die Entstehung der Schwurgerichte* (Berlin, 1871), 76–83; id., *Zur Rechtsgeschichte der römischen und germanischen Urkunde*, 158–61.

<sup>27</sup> *Royal Writs in England from the Conquest to Glanvill*, ed. R. C. van Caenegem, Selden Soc. 77 (London, 1959), 122; *The treatise on the laws and customs of the realm of England commonly called Glanvill*, ed. and tr. G. D. G. Hall (London, 1965), 5; cf. *Formulae*, 62–6 (Marculf, I, nos. 31–5), 291–2 (5, 6), 322–3; Tessier, *Diplomatique*, 18–20, 22–4, 26 ff.; Classen, 'Kaiserreskript', part ii. 89.

<sup>28</sup> The confirmation of an immunity was regularly called a *praeceptum immunitatis*: see 9th-cent. examples amongst the charters of Lewis the German, *Ludovici Germanici, Karlomanni, Ludowici Iunioris Diplomata*, ed. P. Kehr, MGH *Diplomata regum Germaniae ex stirpe Karolinorum* 1, (Berlin, 1956), 69.1, 86.30, 96.5, etc.

<sup>29</sup> *Pippini etc. Diplomata*, 323.25 (for a typical example of authentication by hand and seal); *English Historical Documents* [general editor: D. C. Douglas], i. c.500–1042, ed. D. Whitelock (London, 1955), 442, 444, 446, 448, 451, 452, 454, 459, 475, etc.; W. Levison, *England and the Continent in the Eighth Century* (Oxford UP, 1946), 230–1; Stenton, *Latin Charters*, 34–7; P. Wormald, 'Charters, Law and the Settlement of Disputes in Anglo-Saxon England', in *The Settlement of Disputes in Early Medieval Europe*, ed. Davies and Fouracre.

<sup>30</sup> *Formulae*, 322–3; *Acts of the Parliaments of Scotland*, ed. T. Thomson and C. Innes, 12 vols. (Edinburgh, 1814–75), ii. 22, c. 2 (a. 1434).

liberty of churches to enjoy their property 'in right and lordship . . . for all time . . . doing with it what they should freely decide was for their profit'.<sup>31</sup> But at the same time, royal charters defined the constitutional authority of the ruler, and also the governmental functions of his household from which the charters proceeded and where disputes about them were settled.

By the formulation of the *indicula* ordering the hearing of cases—simply a special variety of the business letters used by the clergy and nobility generally—the Merovingian palace replaced the municipal *curia* as the place where property transactions were registered and enforced. The first pleas (*placita*) of which we have record are a series of land-cases which came to the *palatium* for arbitration because they mostly concerned churches towards which the king had a special responsibility, and because there existed in the royal court the beginnings of an administration which could give written instructions to local agents. A *placitum* was originally no more than a meeting consented to by the parties to a dispute and designed to reach a conclusion which 'pleased' them.<sup>32</sup> One of the principal functions of great men has always been to keep the peace by arbitrating in the disputes of their social dependants.<sup>33</sup> Arbitration changed into adjudication as the 'plea' assumed the form of an appeal to the great man's authority: what pleased the noble or royal arbiter came to be regarded as a legal decision to be enforced on the disputants, and judging was seen as the allocation of rights to the 'winner' and obligations or guilt to the defeated party.

The royal charters recording pleas in the Merovingian palace are a variety of *noticiae*, the documents notifying the conclusions of *placita* of which there are many examples in the formularies. These were the 'agreements of peace' reached in *civitas* or *pagus* before counts or abbots and assemblies of 'good men', which the parties to the disputes accepted and bound themselves to carry out. The subjects of disputes

<sup>31</sup> *Formulae*, 291–2 (nos. 5, 6).

<sup>32</sup> Ibid. 108, 118, 122, 346.30, 594–5 (= the legal 'will' of an individual), 407.1 (*placuit inter nos*); cf. *Lex Salica*, ed. K. A. Eckhardt, MGH Leges nationum Germanicarum (Hanover, 1969), pt. 1, p. 192, for a loan or contract as a *legitimum placitum*; Gregory of Tours, *Libri Historiarum* X, ed. B. Krusch and W. Levison, MGH Scriptores Rerum Merovingicarum 1 (i), (Hanover, 1937–51), 252.15 (V. 44); ibid. 72.10, 91.5, 122.1, 487.10 (what pleases, or is the will of . . .); ibid. 39.10, 304.15, 329.1, 486.15 (mutual will, promise, agreement); ibid. 334.10 and 20, 521.1 (assemblies called by kings); ibid. 201.20, 237.5 343.20, 344.1, 366.20, 367.1, 386–7 ('legal' hearings and judgments in the king's court); J. F. Niermeyer, *Mediae Latinitatis Lexicon Minus* (Leiden, 1954–76), s.v. *placitare*, *placitus*; P. Fouracre, '“Placita” and the settlement of disputes in later Merovingian Francia', in *The Settlement of Disputes in Early Medieval Europe*, ed. Davies and Fouracre.

<sup>33</sup> Cf. Carole Rawcliffe, 'The Great Lord as Peacekeeper: Arbitration by English Noblemen and their Councils in the Later Middle Ages', in *Law and Social Change in British History*, ed. J. A. Guy and H. G. Beale (London: Royal Historical Society, 1984), 34–54.

ranged from homicide to a piece of land which someone claimed by right of succession to his father. And the *noticia* might record that one party ‘kept’ the plea according to law for a day or three whole days or more, and the other did not come or send an excuse (*essonnia*, ‘essoins’), so that he lost the case by default; or that the man accused of homicide cleared himself as the count and *rachimburgii* of the *civitas* of Anjou adjudged—by the oaths of twelve oath-helpers (who supported his oath that he was innocent); or that the tenant of the disputed land produced a writ (*breve sacramentorum*) showing that he had proved his title by oath on a previous occasion.<sup>34</sup>

Almost all the Merovingian *noticiae* concern the landed interests of a few great churches. Of the eighteen *placita* amongst the charters of the Merovingian kings and the five amongst the charters of the Arnulfing (Carolingian) mayors of the palace, no less than thirteen concern the abbey of the king’s ‘special patron Saint Denis, where that dear lord’s body lies’. Saint Denis invariably ‘wins’, even against another abbey or the mayor of the palace himself, and sometimes there is no real contest: the ‘disputes’ are clearly fictional and contrived in order to get a gift or sale, perhaps of the vendor’s inherited property or marriage-portion, confirmed in the most authoritative way. By a judgment in the king’s court the claims of later generations could be silenced, and the vendor and his heirs required to warrant (that is, defend) the purchaser’s title against any future suits for that property in ‘the public courts’.<sup>35</sup>

The royal function of arbitrating in disputes about property-rights, especially those granted to the Church by previous kings, came to be seen as a responsibility and a power bestowed by God—a jurisdiction derived from on high, no longer a role growing out of social custom. One party’s pledging of the other to accept arbitration changed into finding sureties to appear before the king’s court. The emphasis shifted to prosecution by the complainant, who did not merely ‘say’ but ‘suggested to the royal clemency’ or ‘accused’ (*interpellavit*).<sup>36</sup> There was a shift also to judgment by the king—or by the count of his palace, who emerged as the first quasi-professional judge, presiding over a palace-court of assessors drawn from the great men of the land and the king’s household. The king’s function was to order that sworn inquests take place, and lend his authority to the execution of the final judgment

<sup>34</sup> *Formulae*, 9–10 (no. 16), 20–3 (nos. 45–7, 50, 53), 67 (no. 37), 157, 189 (nos. 40–1); cf. *Diplomata . . . Merovingica*, 53–4 (no. 60).

<sup>35</sup> *Diplomata . . . Merovingica*, nos. 34, 35, 37, 60, 64, 70, 73, 76 (p. 68.15), 77, 78, 79 (p. 71.1), 83, 84, 94 (p. 84.35); of the mayors of the palace, nos. 18, 21, 22; see 68.30 for an example of the formula concerning Saint Denis; Classen, ‘Kaiserreskript’, part ii. 70.

<sup>36</sup> *Formulae*, 60.5 and 35, 67.5 and 10, 68 (no. 38), 155.10 and 15, 193.5, 321–5 (esp. no. 50), 362.5, 535.55; *Diplomata . . . Merovingica*, 38 (no. 41), 45 (49), 53–4 (60), 57 (64), 58–9 (66), 62.35, 64, 69.45, 77, 106.35; of the mayors, nos. 10, 21; Classen, ‘Kaiserreskript’, part ii. 33 (for *suggerere*).

so that there should be an end of all disputing on the matter (*et sit . . . omnis lis et altercatio sopita*).<sup>37</sup> The great wealth of the Paris tolls, withheld 'by force' by the mayor of the palace, was returned to Saint Denis; against the protests of the dead tenants' heirs, land was restored to churches which maintained that it had been held only *in precariam*—as leasehold for life; and two years before he usurped the throne of the last Merovingian, Pippin, the mayor of the palace himself, declared a will pleaded by another abbey against the claims of Saint Denis 'for ever null and void'.<sup>38</sup> The ninth-century *Formulae Imperiales* include a series of orders *de rebus redditis*—to restore property or free status which had been found by, for instance, the king's travelling justices (the *missi*), to have been taken away 'unjustly and against the law', and by then it was possible for laymen to win suits in the king's courts, even against churches.<sup>39</sup>

The judges in the first courts of law were assessors presided over by the count of the palace or of the *pagus*. It was on the basis of a report (*testimoniatio*) on the outcome of the pleadings before the nobles (*proceres*) in his palace that the king ordered the concluding of a dispute. The count would certify that the case had been conducted and investigated according to the proper procedure (*acta vel inquisita per ordinem*).<sup>40</sup> Most cases throughout the entire history of civil litigation have been decided in the pleading-contest. Interrogated by the 'good men' of the court, one party was compelled to accept the force of the other's written 'instruments', or to admit his own lack of title-deeds—perhaps simply by failing to appear when required to produce them.<sup>41</sup> The limit of human judgment was the allocation of the burden and the prescription of the means of proof: the presentation of a deed, or an oath by a specified number of oath-helpers.<sup>42</sup> If pleading did not conclude the matter, it could be finally concluded only by *iudicium Dei*, 'the judgment of God' who alone searches the hearts of men, given through a solemn oath on a sacred relic or through an ordeal.<sup>43</sup> The king or the

<sup>37</sup> *Formulae*, 67–8 (nos. 37, 38); *Diplomata . . . Merovingica*, nos. 49 (p. 167.45), 60, 77, 78 (p. 69.45, where it is the mayor of the palace who orders the inquest).

<sup>38</sup> *Diplomata . . . Merovingica*, nos. 64, 77; and of the mayors, nos. 10, 21.

<sup>39</sup> *Formulae*, 321–5, esp. no. 50.

<sup>40</sup> Tessier, *Diplomatique*, 36–8; *Diplomata . . . Merovingica*, nos. 41, 94 etc.

<sup>41</sup> *Diplomata . . . Merovingica*, nos. 34, 59, 70, 73, 76, 77; and of the mayors of the palace, 18, 21; cf. Chris Wickham, *Early Medieval Italy* (London, 1981), 123, for the pleading of charters in the courts of Lombard and Carolingian Italy.

<sup>42</sup> *Diplomata . . . Merovingica*, nos. 49, 59, 60, 78, etc.

<sup>43</sup> F.-L. Ganshof, 'La Preuve dans le droit franc', and J. Gaudemet, 'Les Ordalies au moyen âge', in *La Preuve*, Recueils de la Société Jean Bodin, 17 (Brussels, 1965), part 2, pp. 71–135; *Formulae*, 232–3 (*Noticia de cruce evindicata*), 257.10, 604 ff.; 'the ordeal of the cross' was a form of judgment sometimes used in land cases: the parties stood facing each other before a cross, their arms outstretched, and the first to let them fall lost the case; *Capitularia*, i. 117.30, 118.10, 129.20, 149.20, 160.25, 230.30, 268.10, 269.30, 279.25.

mayor of the palace would adjourn the court till the oath could be taken or the ordeal administered, and a case might therefore have to pass through a number of hearings, weeks apart. In 809, Charlemagne ordered that oaths decided upon in the palace-court should be completed there, and that recalcitrant oath-helpers should be commanded to attend by royal *indiculum* and seal.<sup>44</sup> To keep track of the stages of a plea, the *noticia* had to expand from a note of the judgment into a full record of court proceedings, and that must be why it was not subscribed by the king, though in form it had much in common with a royal precept.<sup>45</sup>

In this way, the Frankish royal palace took from the late Roman municipality the functions and the name of a *curia*. The archetypal court was the *curia regis*, the gathering in which land was formally granted by the king or resigned back into his hands, and disputes settled between the king's tenants-in-chief. That is to put the matter in feudal terms, strictly anachronistic for the Frankish period, but it is clear that the supervision of land-holding was a basic concern of the royal palace from the beginning. Archbishop Hincmar of Rheims, describing Frankish household government in 882 in his *De Ordine Palatii*, was the first we know to have used the word *curiae* of formally constituted assemblies of clergy or laity, which were gathered in the palace to consider matters 'pertaining to the general safety of the king and kingdom', but also to deal with individual legal cases which the count of the palace or others could not settle.<sup>46</sup> It was another two centuries before the Papal *curia* was so-called, by which time the word was regularly used of the king's court when *placita* in an obviously legal sense were being heard.<sup>47</sup>

To give this term 'court' its full meaning as an institution—signifying both the place where judicial business was handled and the judges who sat there to transact it—another word interacted with *curia*. This other word, *curtis*, was derived from the *cohors* of classical Latin, which meant primarily 'an enclosed place' and secondarily 'the multitude enclosed' (and so 'a company of soldiers'). In the barbarian period its basic meaning was a farmstead or manor, especially a royal manor.<sup>48</sup>

<sup>44</sup> *Diplomata . . . Merovingica*, no. 78; *Capitularia*, i. 149.20.

<sup>45</sup> Tessier, *Diplomatique*, 37.

<sup>46</sup> Hincmar von Rheims, *De ordine palatii*, ed. T. Gross and R. Schieffer, MGH Fontes Iuris Germanici Antiqui 3 (Hanover, 1980), 90 (c. 33), 94 (c. 35).

<sup>47</sup> Niermeyer, *Mediae Latinitatis lexicon minus*, and *Dictionary of Medieval Latin from British Sources*, prepared by R. E. Latham (London: Oxford UP for the British Academy: 1981), s.v. *curia*.

<sup>48</sup> C. T. Lewis and C. Short, *Latin Dictionary* (Oxford: Clarendon Press, 1879), s.v. *cohors*; *Lexicon Latinitatis Medii Aevi*, Corpus Christianorum Continuatio Mediaevalis (Turnhout, 1975), s.v. *cortis*; Niermeyer, *lexicon minus*, s.v. *curtis*, 11, 17; Latham, *Dictionary*, s.v. *cors*, 2b.

Charlemagne made grants in 'the royal court' (*curte*, or *curta regali*), and Asser speaks of King Alfred as brought up *in regio curto*. By about 925, *curia* had been so influenced by *curta* that in England it could be defined as a *domus concilii* (council-house), which Aelfric's glossary soon afterwards interpreted as *domhus* ('doom-' or 'judgment-house').<sup>49</sup> On the other hand, *curta* (the enclosure) was conflated with *curia* (the people who might assemble within it) to the extent that its dominant meaning became 'law-court': by 880, it might signify a place where public pleas were heard, and by 1000 one where a bishop exercised his jurisdiction (*generali cortis meae iudicio*).<sup>50</sup> This semantic development can have occurred only because the hearing of pleas was the essential activity in the courts of the great lords, whether these were the king himself and his barons or the rulers of the Church.

#### KEEPING THE PEACE

The purpose of law courts was to maintain social peace by settling disputes. The king's court had no monopoly of judicial functions beyond the adjudication of the land-cases of the greater churches. The local community strove to keep the peace for itself rather as Tacitus had described,<sup>51</sup> the landlords exerting their power to settle the disputes of their tenants and dependents under the guidance of *judices* who knew the customary procedures. The chief subject-matter of this jurisdiction was not landholding by charter but feuding and blood-vengeance and all the violent disturbance of the peace which that entailed. 'Leading men must settle feuds . . .', said a law of the tenth-century English King Edmund.<sup>52</sup> One of the finest pieces of medieval literature, the thirteenth-century *Njal's Saga*, tells how a chieftain skilled in arbitration between feuding kinsmen attempted to bring law to tenth-century Iceland.<sup>53</sup> The obligation to avenge the killing of kinsmen, which constitutes a threat to the integrity of the whole kin, is a founding principle of all societies, and systems of criminal law have not replaced the feud so much as diverted its energies into public forms, leading to conclusions acceptable to the wider community. At the first stage of the process 'stands the local court of arbitration . . . ready to throw [its]

<sup>49</sup> *Formulae*, 396.30 and 45, 399.30, 426.35; *Diplomata* . . . *Merovingica*, 27.40; D. Du Cange, *Glossarium Mediae et Infimae Latinitatis*, s.v. *cortis* (4).

<sup>50</sup> Latham, *Dictionary*, s.v. *curia* 1A.

<sup>51</sup> *Formulae*, 88-9, 156, 230-1, for *noticiae* recording the giving of security by kinsmen not to pursue a feud.

<sup>52</sup> Liebermann, *Die Gesetze der Angelsachsen*, i. 189 (II Eadmund, 7); cf. *Capitularia*, ii. 172.20.

<sup>53</sup> *Njal's Saga*, tr. M. Magnusson and H. Palsson (Harmondsworth: Penguin classics, 1960), esp. 159, 175, 208-9.



weight into the scales on the side of composition and settlement'.<sup>54</sup> In a 'civil war' that arose at Tours in 585 it was rather, Gregory tells us, the communal authorities—he himself as bishop, 'the judge' (presumably the count), and a body of *judices* who took action, arranging a settlement against the letter of the law (for one party had committed widespread arson) in order to restore peace. The 'altercation' came to an end when the Church provided the composition-money, and both sides swore to make no further trouble.<sup>55</sup>

The Germanic name for a plea before one of these local courts was 'Ding' or 'thing', which like Latin *res* had the general meaning of 'any discrete object, matter or event', and as one of its earliest specialized meanings, 'a public or legal matter'. In early Lombardy, *thingatio* was the term for bringing a lawsuit;<sup>56</sup> and in the Germanic form of the oath sworn at Strasbourg in 843, Lewis the German and Charles the Bald undertook not to join in any *thing* (= *plaid*, plea, in the West Frankish version) with their brother Lothar, to the other's damage.<sup>57</sup> In England, the 'thing' as a legal hearing was already associated with a public assembly (*medle*) in seventh-century Kentish laws,<sup>58</sup> and probably local gatherings of this sort were the true soil for the growth of a legal culture throughout Western Europe. We just know so much less about them because they did not deal with the disputes of the magnates about landholding or therefore produce the *noticiae* which were preserved by churches as title-deeds.<sup>59</sup> The Vikings brought with them a more definite concept of the *thing* as a court with a known location, signified by place-names like 'Dingwall' in Scotland and 'Thingwall' in areas of Norse colonization in North-West England.<sup>60</sup> The example of the eight and a half hundreds taking their pleas to *Thingoe* in Suffolk, which were granted as a unit to the monastery of Bury St. Edmunds by Edward the Confessor, suggests that these communal gatherings lie at the root of the system of shire and hundred courts established by the English kings in the tenth century, which provided the basic structure of local government in England.<sup>61</sup> From Celtic Scotland there is evidence of legal assemblies predating the

<sup>54</sup> Wallace-Hadrill, *The Long-Haired Kings*, 124, 142.

<sup>55</sup> Gregory of Tours, *Libri Historiarum* X, 366–8, 519–20 (VII. 47, X. 27).

<sup>56</sup> For the range of meanings of *thing* in Anglo-Saxon, see Liebermann, *Die Gesetze der Angelsachsen*, ii. 222–3, 449–50.

<sup>57</sup> *Capitularia*, ii. 172. 20.

<sup>58</sup> Liebermann, *Die Gesetze der Angelsachsen*, i. 10 (8), ii. 449–50.

<sup>59</sup> Though the *Formulae* (88–9, 156, 230–1) do contain *noticiae* of homicide cases which record security given by the kinsmen not to pursue the feud; it was perhaps as important to preserve these as it was land-charters.

<sup>60</sup> E. Ekwall, *The Concise Oxford Dictionary of English Place-Names*, 4th edn. (Oxford UP, 1960), 465–6.

<sup>61</sup> F. E. Harmer, *Anglo-Saxon Writs* (Manchester UP, 1952), 145, 154–5, 437.

appearance of sherifffdoms, with which *judices* and 'dempsters' may have been associated.<sup>62</sup>

Those who gave judgment in the first courts, whether they were called 'elders', 'doomsters', 'lawmen', or 'judges',<sup>63</sup> derived their authority from landholding, and if the landlord was also a churchman, his obligation to settle disputes and pacify feuds was the greater. The Church brought the ideal of divine justice into the workings of the local courts, but the physical sanctions were wielded by the counts. It might be by the moral pressure of priests and nobles (*sacerdotes et magnifici viri*) that the parties to a feud were restored to 'peace and concord', one side accepting compensation from the other and giving a written assurance that the killing of a brother should never be raised again in court or otherwise (this is the *securitas pro homicidio* in the 'private' section of Marculf's formulary).<sup>64</sup> But it was the power of enforcement possessed by the count and his subordinates which gave such arrangements reliability. The authority of the ordinary public court of Frankish Gaul, the *mallus*, and of the public moot in Anglo-Saxon England, was compounded in equal measure of the moral force of the Church and local community and the physical power of secular officials: the counts and the vicars who acted for them, and in England the eorldermen, shire-reeves and hundred-reeves.

The Franks took the count (*comes*), the official around whom territorial administration in the West was to be constructed, from the government of the late Roman empire. The *comites* or 'companions' were originally those who accompanied the *princeps* on his journeys. As military leaders they were for long subordinate to the dukes, another late Roman institution. It was when the dukes (rather like the Anglo-Saxon ealdormen some centuries later) showed signs of making themselves independent territorial princes that the counts (like the English sheriffs) came to the fore as the king's local agents for military, fiscal, and judicial business. In the course of centuries, the dominant meaning of *comitatus* shifted all the way from the emperor's entourage and the 'central government' of the empire to the office of the count, his 'county', and the county court. The *comitatus* and the *episcopatus*, the territorial jurisdictions of count and bishop, were seen as the twin institutions on which the administration of justice in the countryside rested.<sup>65</sup>

<sup>62</sup> G. W. S. Barrow, *The Kingdom of the Scots* (London, 1973), 70; and 'Popular Courts in Early Medieval Scotland: Some Suggested Place-name Evidence', *Bulletin of the School of Scottish Studies*, 25 (1981), 1-24.

<sup>63</sup> Liebermann, *Die Gesetze der Angelsachsen*, ii, 565-6; for the ubiquitous *judices*, see also Gregory of Tours, *Libri Historiarum* X, 323.15, 367.25, 405.15.

<sup>64</sup> *Formulae*, 88-9, 156.

<sup>65</sup> Fergus Millar, *The Emperor in the Roman World* (London, 1977), 61, 117-19;

Gregory of Tours, writing at the end of the sixth century, gives a vivid picture of a bad count in the person of Leudast, a runaway slave who rose through service in the royal kitchens and the patronage of Queen Marcovefa. Arrogant and rapacious himself, it was appropriate, says Gregory, that he should be appointed by King Charibert as count over the sinful people of Tours, amongst whom he went about fully-armed because he trusted no one. He sat in judgment along with the senior citizens, both laymen and clergy, but he raged and spat abuse if someone came seeking justice at an inopportune moment, and he had no scruples about fettering clerics and putting them to torture. Gregory was made bishop of Tours in 573. Leudast behaved humbly towards him and swore loyalty to his church many times on Saint Martin's tomb—all the while conspiring to get his own friends into the bishopric and the archdeaconry, his candidate on to the throne (Charibert's death being followed by war between his sons), and a dukedom for himself. In 580, Leudast's scheming resulted in Gregory's trial before King Chilperic and a council of bishops on a charge of slandering Queen Fredegund. Out of consideration for the king's feelings, Gregory accepted the judgment that he should swear to his innocence after saying masses at three separate altars, though it was against the Church's laws. By the judgment of God and the grace of St. Martin and St. Medard, Gregory was cleared and the king threatened with excommunication in his turn, until he revealed Leudast as the source of the charge. The count fled, and when he reappeared a few years later and tried (against Gregory's advice) to get back into the king's favour, the queen had him tortured to death.<sup>66</sup> Merovingian justice developed in a world of perjury and torture because it relied on a potent mixture, most obvious when it exploded into conflict, of supernatural judgments mediated by saints and churchmen and the physical force possessed by the king and his counts.

Everyone in the Frankish hierarchy of officials, from the king down through his *missi* and the counts and their vicars to the hundredmen, might preside intermittently over *placita*, but the count alone was becoming the officer and president of a settled court with known times of meeting. To the traditional function of the *mallus* in the settlement of feuds were therefore added the holding of trials and the execution of judgments in the greater *placita* which had been initiated in the

A. R. Lewis, 'The Dukes in the *Regnum Francorum*, A.D. 550–751', *Speculum*, 51 (1976), 381–410; Jones, *The Later Roman Empire*, i. 366–73, ii. 566–86; Niermeyer, *Lexicon Minus*, 207–9.

<sup>66</sup> Gregory of Tours, *Libri Historiarum* X, 257–63, 302–4 (V. 47–9, VI. 32); E. James, 'Beati pacifici: Bishops and the Law in Sixth-Century Gaul', in *Disputes and Settlements: Law and Human Relations in the West*, ed. J. Bossy (Cambridge UP, 1983).

royal palace.<sup>67</sup> At the end of a hearing in the king's court, an order (*indiculum de iudicio evindicato*) would go to the count to execute the judgment against his *pagensis* according to the local law on the matter (*lex loci vestri de tali causa*).<sup>68</sup> A legal system, binding together a hierarchy of courts, began with the marrying of the local tribunals dominated by the counts to a royal jurisdiction over land-grants—a jurisdiction which operated by means of written precepts to the count which called for at least preliminary hearings in the *mallus*. The same process can be documented in late Anglo-Saxon England: the king would send a writ to the bishop, the earl, and the sheriff and all the thegns of a particular shire, notifying them of a grant he had made and commanding them to pronounce judgment in the shire-meeting on those who had infringed it.<sup>69</sup>

A law of personal injuries enforced in public courts began, like the land law, from the political protection which the king granted to a privileged few. Special protections for individuals continued to be sought and granted for many centuries to come, but at a very early stage kings took the decisive step of extending their protection to whole groups of those whom they would eventually call their 'subjects'. Soon after his imperial coronation in 800, Charlemagne sent out pairs of *missi*—Bishop Magenardus and Count Madelgaudus for the area between Rouen and Le Mans, for instance—to enforce a set of laws throughout his realm. The *missi* were to see especially that laymen observed his orders in cases concerning the protection of churches and of widows, orphans, and the powerless (*minus potentium*); forbidding rapine; and enforcing military service—the matters under the ruler's special jurisdiction (*bannum*). Peace was enjoined 'from all men' for those *qui in mundeburde domni imperatoris sunt*.<sup>70</sup>

Frankish rulers took from the Romans, through the mediation of the Church, a concept of 'peace and concord' which could give an ideological basis to a jurisdiction which they were extending by pragmatic acts of protection. But the measure of the growth of peace-keeping

<sup>67</sup> F. N. Estey, 'The Meaning of *Placitum* and *Mallus* in the Capitularies', *Speculum*, 22 (1947), 435–9.

<sup>68</sup> *Formulae*, 59–60 (nos. 27, 28); Brunner, *Die Entstehung der Schwurgerichte*, 80–3, where the *indiculum de iudicio evindicato* is compared to the writ ordering the sheriff to put the victorious party in seisin in *Glanvill*, I. 17 (ed. Hall, p. 11): an example is *Diplomata . . . Merowingica*, no. 60 (p. 54).

<sup>69</sup> Harmer, *Anglo-Saxon Writs*, 159–60 (Bury St. Edmunds 17), 181–4 (Christ Church, Canterbury, 26, 28); *Anglo-Saxon Charters*, ed. and tr. A. J. Robertson (Cambridge UP, 1939), 137–9; reproduced in A. Harding, *The Law Courts of Medieval England* (London and New York, 1973), 130–2.

<sup>70</sup> *Capitularia*, i. 98, 101, 104, 146, 214; translations in H. R. Loyn and J. Percival, *The Reign of Charlemagne* (London, 1975), 79–81; commentary in F.-L. Ganshof, *The Carolingians and the Frankish Monarchy*, tr. Janet Sondheimer (London, 1971), 62, 79, 93.

authority is the increasing use of *fredus*, a German word with a Latin ending. From as far back as we can see amongst the Germanic peoples, compensation to injured parties was accompanied by payments to the chieftains who lent their power to the customary procedures and whose authority might also be regarded as damaged by wrongful acts. As the king emphasized the responsibility of these men to himself, so he asserted his right to the *fredus*. The *Lex Ribuarica* ordered that the fine should not be taken until compensation was paid to the private victim of the injury; but then a third of the sum was to be pledged before witnesses to the king's fisc (not given to the judge), 'so that firm peace shall endure forever' (*ut pax perpetua stabilis permaneat*).<sup>71</sup> The criminal jurisdiction of private lords, monastic and secular, was based on royal grants of immunity from payment of the *fredus* by the inhabitants of their estates: the lords got the fines, and with them the peace-keeping duties.<sup>72</sup> Legislation also grew from the adjusting of the *fredus* to the relative gravity of the injury. In England at the end of the ninth century, King Alfred prefaced his laws with a history of law-making, to show how he was building on the work of his predecessors, the wise men who 'fixed the compensations for many human misdeeds', writing them 'in many synod-books, here one law, there another'.<sup>73</sup>

The Germanic idea of peace is clearest in the Anglo-Saxon laws. These were promulgated in the vernacular but translated into Latin within fifty years of the Norman Conquest,<sup>74</sup> so that we can follow the interpretation of English institutions by a churchman with a broader Frankish perspective. The term in the English laws most commonly translated as *pax* is *frið*, which is the obvious root of *fredus*. *Frið* may be established between nations, as Alfred and Guthrum swore it for the Angles and the Danes of East Anglia 'and for their offspring'.<sup>75</sup> Alfred's and Guthrum's peace began a process more fundamental, however, than the reconciliation of the Danish invaders. To bring the Norse areas under control in the tenth century, the Wessex kings created the administrative order of a new kingdom of England, buttressed by a system of law-courts. Alfred's son Edward (899–924) urged his witan to consider how their *frið* might be better kept, and his earlier provisions for it fulfilled. Edward himself initiated a special fine (*oferhyrnesse*) for

<sup>71</sup> Niermeyer, *lexicon minus*, sub v. *fredus*; *Lex Ribuarica*, ed. F. Beyerle and R. Buchner, MGH Legum Sectio 1, iii. 2 (Hanover, 1954), 134.

<sup>72</sup> *Diplomata . . . Merowingica*, no. 95 (p. 86).

<sup>73</sup> Liebermann, *Die Gesetze der Angelsachsen*, i. 46–7 (Intro. 49.8).

<sup>74</sup> *Leges Henrici Primi*, ed. and tr. L. J. Downer (Oxford: Clarendon Press, 1972), 35–6; for the Anglo-Saxon laws, P. Wormald, *The Making of English Law: King Alfred to the Twelfth Century*, is now the essential guide.

<sup>75</sup> Liebermann, *Die Gesetze der Angelsachsen*, i. 126–9 (AGu. pro., 5; EGu. pro.).

neglect of the new peace-regulations he was making. Anyone was liable to it who sold goods other than before witnesses in a licensed borough, or refused to submit to the courts in a land dispute; and so was the reeve who failed to see that right was done. Reeves were to hold their courts monthly, that all men might have their folkright and every plea (*aelc spraec; placitum*) an end. One who persistently broke the oath and pledge taken by the whole people was to lose the king's friendship (*ure ealra freonsциpes*) and all he possessed. Those that harboured him should forfeit 'as the lawbook says' (*domboc secge; liber iudiciorum docet*); but if it was in East Anglia or Northumbria, the penalties should be according to the peace-agreements (*friðgewritu; scripta pacis*) made with the people of those parts.<sup>76</sup>

Edward's successors built urgently on his foundations, repeating his demands that the peace be better kept. At Grately, King Athelstan issued a comprehensive set of laws about the pursuit, trial, and punishment of thieves, which emphasized the obligation of everyone to attend meetings and ride with their boroughs after malefactors.<sup>77</sup> The bishops and reeves of 'London-borough' added to Athelstan's regulations and set up what the post-Conquest translator could still only call their *friðgild*. Their regulations, as Athelstan confirmed them, required each hundred-reeve to dine monthly with the heads of tithings in his district, 'to take note how our agreement is being observed'. When they rode out after cattle-thieves, hundred after hundred was to take up the trail, and reeve assist reeve, 'for the sake of all our peace and on pain of the king's special fine' (*to ure ealra friðe, be cynges oferhyrnesse*). 'We believe that many heedless men do not care how their cattle wander, out of overconfidence in the peace.' The London ordinance set out the whole philosophy of the peace which the people had promised to the king, a pledge of which every reeve should take from his shire.<sup>78</sup>

The idea of a peace over everyone crystallized as the king established a uniform set of courts and procedures. By Edward's laws a man found his own oath-helpers to defend his property in court: by Athelstan's, independent jurors were chosen for him, to swear 'according to folkright'.<sup>79</sup> In the laws he made at Andover (959 × 963), King Edgar specified three types of court which were to be held throughout the country: the hundred, which was to meet as previously arranged (i.e.

<sup>76</sup> Liebermann, *Die Gesetze der Angelsachsen*, i. 139–45 (I Edw. 1,1; 2,1; II Edw. 1–2, 4–5); *ibid.* ii. 161; J. E. A. Jolliffe, *The Constitutional History of Medieval England*, 2nd edn. (London, 1948), 109.

<sup>77</sup> Liebermann, *Die Gesetze der Angelsachsen*, i. 160–1 (II As. 20), 166–7 (V As. pro.), 83 (VI As. 12,3).

<sup>78</sup> *Ibid.* i. 178–83 (VI As. 8,1; 8,4; 8,7; 8,9; 10–12, 3); H. R. Loyn, *The Governance of Anglo-Saxon England, 500–1087* (London, 1984), 146.

<sup>79</sup> Liebermann, *Die Gesetze der Angelsachsen*, i. 154–5 (II As. 9).

monthly); the borough, to meet three times a year; and the shire court (expounding both ecclesiastical and secular law under the joint presidency of bishop and ealdorman) to meet twice a year. Edgar was willing to allow the Danes their own good laws, but his decree about cattle-stealing was to be common to the whole land; secular rights (*woruldgeriht*) were to be enforced in every province for the sake of God and ‘my full kingship’, and for the benefit and security of poor and rich (*to earmum and eadegum to dearfe and to friðe*). It was the king’s business above all to will the decisions his councillors made for the improvement of the peace—legislation which involved sending copies of the laws to Earl Oslac and the men of Northumbria, and to the ealdormen of Mercia and East Anglia, who were ‘to send them in all directions’.<sup>80</sup> King Ethelred continued to legislate for the peace of the whole people ‘according to English law’ (*aefter Engla lage*), and his royal concerns—that his people should enjoy right law, maintain peace and friendship and a single good coinage, and be zealous in the repair of boroughs and military service—were taken up by the supplanter of his dynasty, the Danish King Cnut, who hardly needed the authority of a letter from the pope to suppress ‘unright’ and ‘establish full peace everywhere’ (*full frið wyrcean*).<sup>81</sup>

There was nevertheless an ebbing of security in Ethelred’s reign, which exposed the kernels of protection exercised by powerful men over particular places and occasions as the real foundations of public order. Apparently with the Danes had come a new word *grið*, which served to distinguish the special peace under the great lord’s *mund* from the abstract ideal of *frið*.<sup>82</sup> The peace within the walls of a church became *cyricgrið*, and royal protection was *cyninges handgrið* (peace given by the king’s own hand).<sup>83</sup> For the implementation of his treaty with the Danes in 991, Ethelred relied heavily on the peace of the burgh, which seemed to spread outwards from the defensible house of the king, and he set out just how merchant ships might be admitted to a *friðbyrig* (‘curiam pacis’ in the post-Conquest translation). In his Wantage laws for the Danelaw, Ethelred declared that breach of the peace given by his hand could not be atoned for with money, if his *grið* was to remain as firm as in the days of his ancestors. But there was also the *grið* which the ealdorman and the king’s reeve gave in the meeting of the Five Boroughs, and that which was given in a single borough, and in a hundred or wapentake, and in an alehouse—there was an appropriate

<sup>80</sup> Liebermann, *Die Gesetze der Angelsachsen*, i. 202–3 (III Eg. 5), 208–9, 212, 214–15 (IV Eg. 2; 12,1; 14–16).

<sup>81</sup> Ibid. i. 216 (I Atr. pro.), 220, 222, 224 (II Atr. Pro.1; 5,2; 7,2), 237, 242 (V Atr. 1; 26,1), 273 (Cn. 1020, 3), 314 (II Cn., 8).

<sup>82</sup> Ibid. ii. 642 (3a).

<sup>83</sup> Ibid. i. 128 (Pro.1), 160 (20,3), 188–9 (5–6).

fine for breaching each of them.<sup>84</sup> The 'king's full mundbryce' was reserved for damaging the king's ships, and above all for breaking church-peace, the essential *griðbryce*, for the king's function was above all to *griðian* and *friþian* churches.<sup>85</sup>

*Grið* and *mund* merged into each other, to the extent that they were conflated in the Latin translator's *pax*. Cnut placed *mundbrice* (*id est, infractionem pacis*, said the translator: 'that is, breach of the peace') at the head of the list of the rights or pleas in the king's personal jurisdiction, followed by attacks on homesteads, lying in ambush, the harbouring of fugitives, and neglect of military service. To start with, the king's *mund* was simply more valuable than the *mund* of an archbishop or royal prince, as his personal power was greater, and the *mundbryce* of archbishop and prince was in turn costlier than a bishop's or an ealdorman's. But through the developing legal processes, the royal *mund* flowed to fill the interstices between the local 'griths' enforced by powerful aristocrats, cementing them into a single public peace.<sup>86</sup> The idea of the king's public authority was abstracted from his concrete exercise of judicial power. Peace was something that wrongdoers as well as their victims were entitled to receive from the king when they came to argue their cases in his courts. *Grið* under the king's *mund* was guaranteed by King Edmund to a killer once he had pledged himself to pay the wergild; and it was *burghbryce* if a wronged person resorted to force without first demanding justice. Cnut conferred a special *grið* on anyone but a proven thief going to or from court ('that is, to a *placitum*', says the translator).<sup>87</sup> A century the other side of the Norman Conquest, Henry II's novel procedure for deciding questions of right to land, the Grand Assize, began with the suing out of a 'writ of peace' by the sitting tenant, to stop the customary method of trial by battle.<sup>88</sup> Only the king wielded this peace: no one else might receive an outlaw, a *friðleasan* man, back into the public peace. *Pax regis* was an abstraction from the workings of *grið* and *mund* in legal proceedings and largely independent of the Roman and ecclesiastical ideal of peace, though it could invoke the support of that ideal when necessary.<sup>89</sup>

<sup>84</sup> Liebermann, *Die Gesetze der Angelsachsen*, i. 222 (2,1), 228–32 (1; 13; 15), 234–5 (4,1), 254–5 (34), 258 (42,3), 263–4 (3; 4,1; 5,1), 282–3 (2,5), ii. 28, 642 (3a); F. W. Maitland, *Domesday Book and Beyond* (Cambridge UP, 1897; repr. Fontana Library 1960), 225–6, 235.

<sup>85</sup> Liebermann, *Die Gesetze der Angelsachsen*, i. 254–5 (34), 258 (42,3), 263–4 (3; 4,1; 5,1), 282–3 (2,5). <sup>86</sup> Ibid. i. 316–17 (12).

<sup>87</sup> Ibid. i. 190 (7), 234–5 (4,1), 366–7 (82).

<sup>88</sup> *Glanvill*, ed. Hall, 29.

<sup>89</sup> Liebermann, *Die Gesetze der Angelsachsen*, i. 274 (Cnut, 1020, 12) 316–19 (II Cnut, 12, 13, 15a), 470–3 (a treatise of 1028 × 1070 *Be griðe y be munde*), 366–7 (82); *Glanvill*, ed. Hall, 29; for sanctuary (*friðsocn*), see Maitland, *Domesday Book and Beyond*, 124; also F. Pollock and F. W. Maitland, *History of English Law before the time of Edward I*, 2nd edn., 2 vols. (Cambridge UP, 1898), ii. 590–1.



## LEGAL ORDER

English developments may help us to understand what had happened earlier in the Frankish empire. The perambulations of the *missi*, the empire-wide oath-taking, and the writing-down of bodies of territorial law which followed Charlemagne's imperial coronation in 800 were no doubt the application of an ecclesiastical ideal of universal peace, but they were also and to a greater degree the culmination of the spreading of the king's *mund* by individual grants and judgments since the earliest days of the Frankish monarchy. Public authority beyond simple military leadership stemmed from the king's direction of a machinery for enforcing his grants and adjudicating the disputes which arose from them. And to get their pleas into the king's court, Franks complained of offences against this legal order, rather than against an ideal peace. The protean quality of *ordo* in classical Latin vocabulary makes all the more illuminating the contexts in which it was most frequently used. Before the concept of an 'order' of persons with its proper place in society came the idea of a proper 'ordering': of a procedure carried out properly, in a regular manner, perhaps under the 'orders' of king or magistrate. Amongst the Romans, it was the *ordo iudiciorum publicum*, the 'ordinary' way of trying criminals, and the parallel *ordo* for deciding disputes about inheritance, which bulked largest. The Visigothic laws speak of 'the legal order' (*legalis ordo*), the 'order of succession' to property, and also of royal 'ordering' (*ordinatio*).<sup>90</sup>

Merovingian pleas introduced the formula which shows clearly that the dominant meaning of order was due process in the transfer and inheritance of land. In 679 a lady complained in King Theuderic's palace that the estate which should have come to her by inheritance from her mother was being withheld by the defendant, 'in bad order' (*malo ordine*). The same complaint, *malo ordine contradiceret vel post se retineret*, recurs especially in pleas where it was claimed that the disputed lands had been given to a church and returned to the donor for his lifetime only; the dispute arose when the life-tenant died.<sup>91</sup> The formularies have allegations that defendants 'possess' *malo ordine* estates which properly belong to the complainants 'by legitimate

<sup>90</sup> Justinian's *Code*, 3. 8; the *Digest*, 48. 1. 8; cf. W. Kunkel, *An Introduction to Roman Legal and Constitutional History*, tr. J. M. Kelly, 2nd edn. (Oxford UP, 1973), 69 ff.; *Leges Visigothorum*, ed. K. Zeumer, MGH Legum Sectio 1. 1 (Hanover, 1902), 78.15, 99.10, 394.1 etc. for *legalis ordo*, and 244.5, 344.5, 367.15 etc. for *regalis ordinatio*; *Leges Burgundionum*, ed. L. R. von Salis, MGH Leges nationum Germanicarum 2, 1 (Hanover, 1892), 88.5, 99.10 for inheritance *aequo iure et ordine*.

<sup>91</sup> *Diplomata . . . Merovingica*, nos. 49, 59, 83; diplomas of the mayors of the palace, nos. 10 (p. 98.4), 18 (104.45).

succession'; and that couples have joined in marriage without the consent of kinsmen 'irregularly, against law and justice' (*malo ordine contra legem et iustitiam*).<sup>92</sup> Quite often the verb which accompanies *malo ordine* indicates an element of organized fraud or violence in the disorderly proceedings: the defendant is said to have 'entered', 'invaded', 'usurped', or 'ploughed' the complainant's land *malo ordine*, carried off his goods, or even assaulted his person with a drawn sword (*malo ordine . . . evaginato gladio super eum venit*).<sup>93</sup> But the basic sense of *malo ordine* seems to be possession against right (*dricum* = Latin *directum* and French *droit*), not justified by a deed, or without the judgment of a court (*vel sine iudicio*).<sup>94</sup> In order to describe violent occupation there may be added to the allegation of unjust possession the words *per forcia*.<sup>95</sup> According to the *Lex Ribuarica*, a charge of invasion *malo ordine* was silenced by the presentation of a charter: *Non malo ordine, sed per testamentum hoc teneo*.<sup>96</sup> 'Right order' meant 'good title' to property, one which gave the holder (amongst other things) freedom to order (*ordinare*) what should happen to it thereafter.<sup>97</sup>

All the legitimate orders or paths by which landed power was attained stood within the *regali ordine* of the king's authority which confirmed and protected it.<sup>98</sup> By the ninth century, the ordaining activity of the king had settled into a 'legal order' which the trusted bishops and counts who were his *missi* were appointed to enforce wherever they 'found anything unjust', in *Francia*, Burgundy, and Italy.<sup>99</sup>

<sup>92</sup> *Formulae*, 152.5, 154.20.

<sup>93</sup> Brunner, *Deutsche Rechtsgeschichte*, ii. 512; *Formulae*, 13.20, 21.10, 153.10, 154.5, 155.10; *Lex Ribuarica*, ed. F. Beyerle and R. Buchner, MGH Legum Sectio 1. iii (ii) (Hanover, 1954), 108.2, 122.1, 125.14; *Leges Alamannorum*, ed. J. Merkel, MGH Leges in Folio 3 (1883), 64-5(b), 156.15; Julius Goebel, *Felony and Misdemeanor*, i (New York and London, 1937), 39-44, 156, has a valuable discussion of the meaning of *malo ordine*, but does not connect it specifically with title to land.

<sup>94</sup> *Formulae*, 174.5, 192.1, 259.20, 334.5; the function of *malo ordine* is sometimes fulfilled by a simple *iniuste* (e.g. in *Diplomata . . . Merovingica*, diplomas of the mayors of the palace, no. 21: p. 106.45); cf. the 12th-cent. English writ of novel disseisin which alleged that the disseisin was *iniuste et sine iudicio*: examples in *Royal Writs in England from the Conquest to Glanvill*, ed. R.C. Van Caenegem, Selden Soc. 77 (London, 1959), 453 (no. 80), 455 (no. 85).

<sup>95</sup> For *per forcia*, sometimes accompanied by *malo ordine* and sometimes on its own, see *Diplomata . . . Merovingica*, nos. 70 and 77 (pp. 62.45, 69.1); cf. *Formulae*, 59.20, 60.10, 174.5, 194.20, 256.10.

<sup>96</sup> *Lex Ribuarica*, 116.5.  
<sup>97</sup> *Diplomata . . . Merovingica*, no. 12 (p. 14.35 and 45); *Karoli III Diplomata*, ed. P. Kehr, MGH Diplomata regum Germaniae ex stirpe Karolinorum 2 (Berlin, 1936-7), 187.30 (*absque alicuius inquietudine eas tenere et libere ordinare*), 224.5 (*perpetuo ordinant atque integerrime possideant*); *Arnolphi Diplomata*, ed. P. Kehr, MGH Diplomata regum Germaniae ex stirpe Karolinorum 3 (Berlin 1955), 186.20 (*conquisitionis titulum vel ordinem*), and cf. p. 215.5 (*ipso statu et ordine*).

<sup>98</sup> *Recueil des Actes de Charles II le Chauve*, 3 vols, ed. F. Lot and G. Tessier (Paris, 1944-55), i. 107.12 (*auctoritatem regali ordine more firmatam*).

<sup>99</sup> *Karoli III Diplomata*, 40.1 (*quicquid ibi iniuste invenissent, legali ordine ad finem perducerent*); *I Placiti del 'Regnum Italiae'*, ed. C. Manaresi, 3 vols., *Fonti per la Storia d'Italia* (Rome, 1955-60), i. 88.1 (the hearing of cases *per ordinem*, in the palace of Spoleto).

Many cases were brought before Italian courts by allegations that defendants had entered others' lands or detained their serfs *contra legem et malo ordine et contra rationem*.<sup>100</sup> There was an appropriate compensation to be paid by those who were convicted of invading *malo ordine* property with which others had been 'invested legally' or 'by just order' (*legibus vestitus; iuste ordine vestitus*).<sup>101</sup> Talk of 'bad order' and 'just order' seems to have fallen into disuse as the Carolingian empire disintegrated, the Church's ideal of peace taking over its territory, but kings went on granting and confirming grants of land to be held *inconvulso ordine, inconcusso ordine*, or more usually *quieto ordine*, by which they seem to have meant in the first place a title protected in the courts.<sup>102</sup> In post-Conquest England the notion of legal 'quiet' gained new dimensions in the 'quit-claim' (*quietantia, quita clamantia*) or surrender of claim to another's property, and in a person's 'acquittal' of a charge in the courts.<sup>103</sup>

The legal order of the Carolingians was a set of procedures for the trial of disputes. The centuries-long process of replacing the feud and self-help by public judgments under the royal ban gathered momentum, as the king enforced standard procedures of trial by boiling or cold water and the other forms of proof by ordeal (*ordines ad singulas probationes spectantes*).<sup>104</sup> Carolingian rule bequeathed a further method of proof to medieval Europe: the inquiry (inquest, inquisition) by sworn witnesses or jurors. At first, the judgment of God was replaced by the verdict of human experts only in land disputes. The Carolingians began to prescribe beforehand by an *indiculum* how an 'inquisition or witnessing' should be conducted in cases before the counts. In court, 'the testimonies were heard and weighed, and the writs read over, and all inquired in due order and by law [*ab ordine . . . et per veram legem inquisita*] . . . according to the command and *indiculum* of the most pious lord emperor.'<sup>105</sup> Capitularies of the first decade of the ninth century ordered that there be 'diligent inquiry' in disputes about church property; and that in Italy counts should generally bring to hearings people with knowledge of the cases in hand, which might then be

<sup>100</sup> *I Placiti del 'Regnum Italiae'*, i. 38.9, 73.9, 111.8, 126.12, 222.12, 238.12, 243.12, 253.13, 278.12, 285.11, 319.19, 349.5, 353.9, 377.6, 461.1, 486.3, 528.20, 532.10, 548.19, 549.8.

<sup>101</sup> *Ibid.* i. 73.29, 109.5, 235.19, 477.4, 489.16, 499.7.

<sup>102</sup> *Ibid.* i. 39.27, 100.24, 101.4, 102.9, 135.5, 137.25, 138.23.

<sup>103</sup> For the English quit-claim, see F. Pollock and F. W. Maitland, *The History of English Law before the Time of Edward I*, 2nd edn. (Cambridge UP, 1898), ii. 91–2.

<sup>104</sup> The *probationes* are set out in *Formulae*, pp. 604–722 and cf. *Capitularia*, i. 107 (c. 17), 210 (c. 12), 281.

<sup>105</sup> *I Placiti del 'Regnum Italiae'*, i. 39.25, 138.20, 202.22; *Diplomata . . . Merovingica*, 32.47, 59.3 (a suitor in the Merovingian palace might be allowed to proceed by whatever 'order' he chose.), 68.7.

concluded (*definita*) by their inquisition. To have your claim that property had been stolen 'by evil cunning' investigated by a royal inquest, perhaps before specially appointed *missi*, was the most valuable of privileges. The greater churches were conceded the right to have their own 'advocates' to prosecute the inquests and defend their property before *missi* without interference by the counts of the region, choosing 'suitable' and 'truthful' freemen of the neighbourhood and compelling them to swear to the facts.<sup>106</sup>

The verdict (*verdictum*: statement of truth) which was returned by the members of the inquisition must always have been under oath; and litigants cannot have seen much difference between having a group of neighbours support their oaths in the time-honoured fashion and getting them to swear to 'what they knew to be the truth of the case', as they can be seen doing in inquests everywhere by the mid-ninth century.<sup>107</sup> Amongst jurors (i.e. oath-swearers) the distinctions between supporters, witnesses, and judges of evidence presented to them were blurred for a long time to come. A bishop who alleged that he had been 'divested' *iniuste et malo ordine* of lands belonging to his bishopric would give his opponent a pledge to prove his case in court 'by witnesses or by the men of an inquisition' (*ad probandum per testes aut per homines inquisicione*). In this instance, it is recorded that an *inquisitio* of four persons gave its verdict, to the effect that it appeared to the 'hearers' (*auditores*) that the bishop's claim was 'right', and judgment was consequently given in his favour.<sup>108</sup> The civil inquest prescribed by royal letter became the foundation of legal procedure. The assizes or 'sessions' of juries instructed in the legal issues by royal writs, as they were devised by the Angevin Henry II in the late twelfth-century and from which grew the English common law, elaborated on this basic idea.<sup>109</sup>

<sup>106</sup> *Capitularia*, i. 107 (c.17), 210 (c.12); *Lotharii I et Lotharii II Diplomata*, ed. T. Schieffer, MGH Diplomata Karolinorum 3 (Berlin, 1966), 68.30, 84.30, 111-12, 126.10-15, 131.20, 151.35, 156.30, 164.25, 165.30, 186.15-20, 268.5-20; *Actes de Charles II le Chauve*, i. 347.19, ii. 336.2 (a monastery to have advocates to inquire along with royal *missi* in a specific case), 395; *Ludowici Germanici [etc.] Diplomata*, 89.1, 101.25 (*cum sacramento inquirantur*), 204.1, 209.10; *Karoli III Diplomata*, 53.20 (before the emperor himself), 78.15-30, 91.35, 147.15 (*cum iureiurando studiosissime fiat inquisitio*, if the rights of a bishopric are infringed), 258.40 (*cum coacto iuramento*), 331.35; *Arnolfi Diplomata*, 115 (the advocatus of the bishop of Passau given royal authority to make inquiry *cum iusticia legali et cum populis veracibus* of infringements of episcopal rights by the King Arnulf's own men), 163.15, 196.30.

<sup>107</sup> Niermeyer, *lexicon minus*, sub vv. *inquaestus* and *inquisitio* (3).

<sup>108</sup> For the inquisitions which the Church used also for its own disciplinary purposes and internal dispute-settlement, see *Concilia Aevi Karolini*, 1, part i, ed. A. Werminghoff, MGH Legum Sectio 3 (Hanover, 1906), 232.5, 479.15, 685.1, 784.15.

<sup>109</sup> *I Placiti del 'Regnum Italiae'*, i. 489-90 (a. 919); cf. *ibid.* i. 46, 71.1, 72.6, 73.15, 81.24, 81.29, 82.4, 100-1 ('*Relecto hoc indiculo . . . breve de illis testimoniis . . . relegi fecit . . .*'), 122, 211-15, 239-40, 352.33, 405.4, 480.14, 489-90 (a. 919), 565, 573, iii. 1.1; Niermeyer, *lexicon minus*, sub v. *brevis*; for examples of *brevia* produced or failing to be produced to

The sworn inquest could also be applied to the injuries which would come to be seen as 'crimes' against public authority. The *missi* sitting at Risano in Istria in 804 proceeded by selecting 'chief men' from all the villages, to the number of 172, and making them swear on the gospels and the relics of saints to answer truthfully and without fear the questions they put to them, which were firstly about the things of the Church, then about the justice administered by lords, the violent ways of the people, and the situation of widows and orphans. The jurors in this instance brought the *missi* writs (*brevia*) maintaining that the Church had denied the people their customs. In 850, it was accepted that the best way to track down thieves in Italy was by inquiry on oath 'from all the people round about'.<sup>110</sup> In England 150 years later, the twelve senior thegns and the reeve were required to swear in the wapentake court to the names of wrongdoers.<sup>111</sup>

The Carolingians' other great contribution to the legal order beside the inquest was the corps of semi-professional judges whose function it was to hear inquests and conduct the affairs of the public courts. At least seven *scabini* were intended to be present at every plea, for there was an increasing amount of law to be decided.<sup>112</sup> The defendant's formal denial that he had dispossessed the plaintiff *iniuste et malo ordine* might rest on the contention that the disputed land had been his father's hereditary property or given to him as a royal benefice, or that it was in the full ownership of his bishopric for sixty years past: issues of law as well as of fact. A claim to personal freedom might be based on a charter of enfranchisement made 'as the legal order and the ancient custom of the realm demanded'. The *notitia* of a case heard in the ducal court (*curte ducati*) of Turin before the count and *scabini*, including two 'Roman *scabini*', and another count and a *judex* acting as royal *missi*, might be disregarded because 'all that was done there was done by force and not by judgment'.<sup>113</sup> *Scabini* and other 'proper persons' (*idonei homines*) might support the claim that a charter proffered by a defendant was invalid because it had not been written by a public notary.<sup>114</sup> Documents were of greatest importance in the legal arguments of Italy and southern Gaul, where there seem to have been more lawyers than in the north who were knowledgeable in both Roman and Frankish law

support legal claims or carry cases forward, see *I Placiti del 'Regnum Italiae'*, i. 201.27, 212-13, 405.4, iii. 23; Van Caenegem, *Royal Writs in England*.

<sup>110</sup> *I Placiti del 'Regnum Italiae'*, i. 50; *Capitularia*, ii. 87 (c. 3).

<sup>111</sup> Liebermann, *Die Gesetze der Angelsachsen*, i. 228 (3,1).

<sup>112</sup> *Capitularia*, i. 185 (cc. 1-2), ii. 8; Ganshof, *The Carolingians and the Frankish Monarchy*, 148-50, 157 n. 49; F. N. Estey, 'The *Scabini* and the Local Courts', *Speculum*, 26 (1951), 119-29; *I Placiti del 'Regnum Italiae'*, i. 353, 377-8, 477, 548-9.

<sup>113</sup> *Capitularia*, i. 322, 420.7.

<sup>114</sup> *Ibid.* i. 348-50.

(*scavini, tam romani quam salici*).<sup>115</sup> But *scabini, advocati, testes*, and *judices* multiplied everywhere, their roles ill-distinguished.<sup>116</sup> And along with this proliferation of lawyers there appeared a new type of legal wrong (*tortum*, 'tort'): the false complaint or pleading which was quite logically presumed of those who lost their cases. A defeated plaintiff was liable to a fine, which we know about because Charles the Bald exempted the advocates of privileged monasteries from *illud quod vulgo dicitur tortum*.<sup>117</sup>

Charlemagne was not truly able to create a staff of impartial assessors for his courts: the *scabini* remained local freeholders, whose private interests were inextricable from their judicial functions.<sup>118</sup> Yet as *scavini, échevins*, or *Schöffen*, they continued to perform a role in Italy, France, and Germany long after the disappearance of the empire which they were devised to serve; and Charlemagne did manage to establish some lasting principles for the administration of justice by judges at all levels. Trials affecting a man's personal freedom or landed property (his two most treasured possessions) were to be held before superior justices: the count and the *missi dominici*. But all *judices* were enjoined to resist the influence of magnates, and judge justly according to written law, not 'their own arbitrary opinion'. This fundamental rule, enshrined in a capitulary of 802, brought together the written instruments of landholding and its adjudication, and the codes of territorial law into which Charlemagne was at that moment turning barbarian customs, and set them apart as the true sources of law. Other more specific rules of great importance would be deducible from it: such as the rule of English law that no one could be made to answer for his freehold except by royal writ.<sup>119</sup>

To begin with, the order of the Carolingian and Anglo-Saxon kingdoms had been essentially the regulation of the landholding of the few great churchmen and lay magnates on whom kings relied for the rule of their kingdoms. This was an order enshrined in simple rules of legal procedure. Allegation or denial of disorderly behaviour was a formal requirement to get your case heard in a royal court or to escape its

<sup>115</sup> P. M. Conti, "Exceptores" e "cives", *Studi Medievali*, 3rd ser. 23 (1982), 101–50; S. Weinberger, 'Cours judiciaires, justice et responsabilité sociale dans la Provence médiévale: IX<sup>e</sup>–XI<sup>e</sup> siècle', *Revue Historique*, 267:2 (1982), 273–88, at p. 277;

<sup>116</sup> Estey, 'Scabini and the Local Courts', 121; for *scavini* acting as advocates and on inquests, see for example *I Placiti del 'Regnum Italiae'*, 320.18, 321–2, ii. 505–8.

<sup>117</sup> Niermeyer, *lexicon minus*, sub v. *tortum*; *Recueil des Actes de Charles II Le Chauve*, i. 161.4, ii. 336.13.

<sup>118</sup> Estey, 'Scabini and the Local Courts', 124–5.

<sup>119</sup> *Capitularia*, i. 93 (c. 9), 96 (cc. 25–6), 153 (c. 3), 154 (c. 15); Ganshof, *The Carolingians and the Frankish Monarchy*, 150–1, 159; for the writing-down and correction of the laws, see *Capitularia*, i. 105, and Einhard, *Vita Karoli Magni*, ed. O. Holder-Egger, MGH *Scriptores rerum Germanicarum* 25 (Hanover, 1911), 24–5 (ch. 29); S. F. C. Milsom, *The Legal Framework of English Feudalism* (Cambridge UP, 1976), 46.

jurisdiction. The occupation of an estate was 'in bad order', 'against right' and 'unjust' if it was unauthorized by a previous judgment.<sup>120</sup> The continued making or confirming by kings of grants of property to be held in 'undisturbed' or 'quiet and secure' order, *quiete ab omni seculari accione*, the pleading of such grants in the courts,<sup>121</sup> and the surrendering of property by parties to English land-transactions 'quit' of any claim, all testified to the debt of European land law to the legal procedures developed by the Franks. The declaration by justices in medieval England that those found not guilty of injuries might go *inde quieti* shows that criminal law owed a similar debt.<sup>122</sup>

Concepts of order widened from the sphere of land-tenure to the regulation of a hierarchy of courts: the royal palace, hearings before *missi dominici*, and the *mallus* presided over by the count, or his *missus*, or a *centenarius* (cf. the English hundredman).<sup>123</sup> The courts of churchmen were also enjoined by the king to work for the Christian commonwealth as a whole. To conduct their courts and hold inquisitions, ecclesiastical lords were to have lay 'advocates' who knew the law and loved justice; and in the public courts bishops were 'to stand with counts and counts with bishops, so that each might better fulfill his ministry'.<sup>124</sup> In the remedying of serious personal injuries the feud remained dominant, but even the feud was circumscribed in its operation by Carolingian order. There were already Merovingian *indicula* ordering compensation for assault and robbery, and procedures for clearing oneself of a charge of homicide and the necessity of paying

<sup>120</sup> For examples, see *Formulae*, p. 174.5; *I Placiti del 'Regnum Italiae'*, i. 150.10; Pollock and Maitland, *History of English Law before the Time of Edward I*, ii. 52 (for the equation of the *sine iudicio* of Henry II's assize of novel disseisin with the canonists' *absque ordine iudiciario*), 91, 187.

<sup>121</sup> *Diplomata* . . . *Merowingica*, 29.14 ('. . . ut absque ullius impugnatione forestariorum vel cuiuslibet personae liceat ipsam familiam Dei quieto ordine residere'); *Capitularia*, i. 15.31 ('inconcusso iure' = 'ordine inconcusso'); *Actes de Charles II Le Chauve*, i. 6.11 ('. . . quiete tenere ac defendere legaliter in omnibus mundanis actionibus ac querelis'); *Recueil des Chartes de L'Abbaye de Cluny*, 6 vols. ed. A. Bruel, Collections des documents inédits sur l'histoire de France (Paris, 1876-94), i. 56, 75, 80 ('. . . quiete et securo ordine possidere valeat absque ullius contradictione'), 128, 380, 382, 384; *The Acts of Malcolm IV King of Scots 1153-1165*, ed. G. W. S. Barrow, *Regesta Regum Scottorum* 1 (Edinburgh UP, 1960), 207 ('. . . quietas ab omni seculari exactione'), 209 ('. . . quiete ab omni seculari accione'); *Recueil des Actes de Charles III le Simple Roi de France (893-923)*, ed. F. Lot and P. Lauer, 2 vols., *Chartes et Diplomes relatifs à l'histoire de France* (Paris, 1949), 28.9.

<sup>122</sup> Niermeyer, *lexicon minus*, and *Revised Medieval Latin Word-List*, prepared by R. E. Latham (British Academy: London, 1965), s.v. *quietus*.

<sup>123</sup> Royal orders in the *Formulae Imperiales* are regularly addressed *episcopis, abbatibus, comitibus, gastaldiis, vicariis, centenariis, clusariis seu etiam missis nostris discurrentibus*: e.g. *Formulae*, 230.14, 302.14, 309.2, 232-3 etc.; Ganshof, *The Carolingians and the Frankish Monarchy*, 91, 114, 147-8, 150, 151, 257.

<sup>124</sup> *Capitularia*, i. 93 (13), 158.33; *Arnolfi Diplomata*, 115.4 ('. . . ut advocatus predicti episcopi illos ad manum nostram inquireret'); Ganshof, *The Carolingians and the Frankish Monarchy*, 64, 114; J. M. Wallace-Hadrill, *The Frankish Church* (Oxford UP, 1983), 261.

compensation. Charlemagne and Louis the Pious tried to compel the peaceful settlement of feuds and to keep apart kinsmen who would not give or receive compensation. At the same time the feud was being replaced in a more fundamental way by the prescription of death, with no possibility of redemption, for perpetrators of treason, rape, and killing 'without cause'. It was still necessary to forbid feuds against officials who killed thieves.<sup>125</sup>

#### 'THE STATE OF THE REALM'

The practical application of the royal law-giving of the Franks and Anglo-Saxons, and the effectiveness of their legal order should not be exaggerated. As Patrick Wormald argues, the ancient law-codes of the Frankish people were largely 'inert symbols' of their empire and historical identity, and the erratically preserved Anglo-Saxon 'legislation', waxing and waning with the 'imperial consciousness' of English kings, was never cited in the legal hearings of which we have record. In law-codes was a nation's history: the structure of a 'state' was to be found in the institutions and procedures by which the king did justice to his people, and the first expressions of ideas about the state of the kingdom are in royal charters and the administrative orders such as are gathered in Frankish capitularies.<sup>126</sup>

From Merovingian times kings granted lands and immunities to churchmen to reside upon 'in quiet order', praying for 'the stability of the realm'.<sup>127</sup> And, as the Church proclaimed at the Council of Paris in 829, 'equitable judgments established the realm and injustice overturned it': *per iustitiam stet regnum*.<sup>128</sup> It was surely churchmen who first used the Roman lawyer's *status* as a synonym for *stabilitas*, and translated *status reipublicae* ('the state of the republic'), which for Cicero had been contained chiefly in the decisions of its courts, into *regni pax et status*.<sup>129</sup> In 761, Pope Paul I founded a monastery in memory of two of his predecessors, where prayers were to be said for the 'extension and stability of the commonwealth [*rei publicae*] and also the salvation of all faithful Christians'; and at about the same time the bishop of Bourges ordered the tithing of his servants, 'for the sake of the

<sup>125</sup> *Formulae*, 22, 60–1; *Capitularia*, i. 16 (4, 5), 51 (21, 22), 70 (31), 72 (9), 97 (32), 104 (42), 148 (1, 2), 201 (4), 217 (7), 284 (13), 290 (12); ii. 107 (1), 272 (5), 336 (10), 343–4 (3).

<sup>126</sup> Wormald, *The Making of English Law: King Alfred to the Twelfth Century*, 45, 49, 417.

<sup>127</sup> *Diplomata . . . Merovingica*, 29.14; *Formulae*, 46.20, 171.25, 200.25.

<sup>128</sup> *Concilia Aevi Karolini*, I (i), 654.

<sup>129</sup> *Ibid.*, I (i), 67.9; *Formulae*, 421.29 and note (e); Cicero, *De Republica*, 1. 25. 38, and *Oratio pro Sulla*, 22, 63.



state of that church and the *stabilitas* of its lords [*seniorum*]', and for the bishop's (? spiritual) profit.<sup>130</sup>

Expressions of the responsibility of kings for the *status ecclesiae* go back to the earliest days of the Church in the barbarian West. Charlemagne's chief care was for 'the state of our churches', which became 'the state of the church' in the first chapter of an Italian capitulary instructing the various groups of clergy and monks to live according to their rules (*per ordinem*), and all to obey royal justice in respect of churches within the protection of the palace. The proper election of bishops was said to profit the rule of the people (*regimine populari*) as well as the *status ecclesiae*.<sup>131</sup> As the first cracks in the empire began to appear in the reign of Louis the Pious, the demands in charters that the beneficiaries pray for the stability of the realm were made with increasing urgency, and 'the state of the whole realm' became the chief preoccupation. This phrase appears in the *ordinatio imperii* of 817, when Louis the Pious divided his landed inheritance between his sons after the custom of the Franks but sought to preserve the empire's unity under his eldest son. A few years later, Louis appealed to his people to be his helpers in conserving 'the honour of the holy church of God and the *status regni*', each 'in his place and order' (*in suo loco et ordine*). The bishops also, when making representations to the emperor about the Church's rights and the observation of 'regular order', enjoined prayers for 'the state of the realm and the commonwealth'.<sup>132</sup> The deteriorating 'state of this realm' was still understood principally as it affected the Church, which in 833 required a penance of Louis for his mistakes in the exercise of empire and took the lead in discussions about 'the present peril and future state' of the kingdom.<sup>133</sup>

But long before Louis's death in 840, his sons were taking thought for the states of their separate parts of the inheritance. A capitulary issued by the eldest son, Lothar, for Italy in 825, imposed provisions necessary for 'the state and utility of the realm' equally upon churches—immunities not excluded—and the 'lay order'. No one in occupation of land should escape the military service due from it by donating it 'fraudulently' to a church.<sup>134</sup> In charters, *status regni* now becomes commonplace. Lewis 'the German' (for the eastern section of the Carolingian

<sup>130</sup> *Concilia Aevi Karolini*, I (i), 67.9; *Formulae*, 171.25.

<sup>131</sup> Y. Congar, 'Status Ecclesiae', *Studia Gratiana*, 15 (1972), 1–31; *Formulae*, 119.7; *Capitularia*, i. 80.25, 189 (5), 248.22.

<sup>132</sup> *Capitularia*, i. 270.36; 303, 370.1; *Formulae*, 421.29.

<sup>133</sup> *Capitularia*, ii. 50–1, 56.15.

<sup>134</sup> *Ibid.* i. 330; *Lotharii I et Lotharii II Diplomata*, 128.25, 308.1 (*statum imperii*); *Formulae*, 398.20, 415.10, 508.5; cf. *Diplomi Italiani di Lodovico III e di Rodolfo II*, ed. L. Schiaparelli, i (Rome, 1910), 15.14 (a. 900: a bishop and his successors, their property and *familia* to remain under the king's protection *quiete et pacifice* . . . *remota totius potestatis inquietudine*, praying *pro nobis nostrique regni statu*).

lands had been allotted to him) granted immunities to be possessed *quieto ordine* and in return for prayers for the safety of his family and ‘the stability of our whole empire’ (or ‘the stability of the realm’ or ‘the state of our whole realm’). Towards 840, in a charter confirming the titles of the monastery of Corvey, Lewis spoke of himself as holding court at Paderborn ‘for the government of holy mother the universal church, and also for the state of the realm committed to us by divine and paternal right’.<sup>135</sup> Lewis’s son, Charles the Fat, trusted in 882 that it was ‘for the state of his kingdom’ that he answered generously the petitions of his faithful vassals.<sup>136</sup> Louis ‘d’Outremer’, one of the last Carolingian rulers of that western part of the empire soon to be known as France, listened in 946 to the urgings of two of his dukes *pro statu et stabilitate regni nostri*, and for ‘the state of the church’ granted to the abbey of Cluny certain lands of the viscounty of Lyons. The corpus of charters of this greatest of monasteries, founded in Burgundy in 910 on property given by duke William of Aquitaine, shows clearly the difference of roles, as they had developed since at least the time of Marculf, between even the greatest of landlords who endowed churches out of their own estates and the kings who ensured the stability of their realms by giving political sanction to the grants of their vassals. Around the year 994, Rudolf III, king of Burgundy, confirmed all the possessions granted or to be granted to Cluny, *pro nobis quam pro statu regni totius nostri*; and Robert I, king of France (996–1031), alone and then with his son Hugh, confirmed grants made to the monks who prayed at Cluny for the state of the whole church—grants which should stand in perpetuity ‘for us and for the state and safety (*incolomitate*) of our realm, along with that of our nobles, and of all Christ’s faithful people, living and dead’. Duke William of Aquitaine, the successor of Cluny’s founder looked for the same spiritual benefits in his grants, but made no such claims to state.<sup>137</sup>

Frankish kings endowed churches ‘for the [good] state of the commonwealth and the salvation of all Christian people’. The Frankish state was part of the universal order of Christianity, but its stability and continuity were embodied in a legal order created by the *statuta* of its

<sup>135</sup> *Ludowici Germanici [etc.] Diplomata*, I, 31.35, 65.10, 67.5, 80.1, 315.15, 354.15.

<sup>136</sup> *Karoli III Diplomata*, 8.10, 12.30, 17.1, 34.5, 131.10, 147.10.

<sup>137</sup> *Recueil des Chartes de L’Abbaye de Cluny*, i. 380 (no. 396): a grant by Rudolf II of upper Burgundy, for prayers *pro nobis quam pro statu regni nostri*; for royal acts in the early volumes of the Cluny charters, few of them grants of a king’s own property, see: i, nos. 16, 17, 21 (Charles the Bald), 70, 78, 223, 237, 242, 245, 246, 247 (Louis the Blind, k. of Provence), 285, 396, 397, 398 (Rudolf II of Burgundy), 417 (Hugh of Arles, k. of Italy and his son Lothar), 622, 627, 628, 631 (Conrad of Burgundy), 688, 689, 763, 774 (Louis IV ‘d’Outremer’, k. of the West Franks); ii, nos. 980, 1067 (Lothar, k. of the West Franks), 1052, 1152, 1716 (Conrad of Burgundy), 1143, 1262 (the Emperor Otto I); iii, nos. 2270, 2466, 2485, 2711 (royal grants), 2716, 2737 (grants of William of Aquitaine).

kings. In July 917, Charles III renewed the privileges, twice destroyed with the monastery itself, of the church founded by his grandfather in the palace at Compiègne: anyone who violated the statutes which the emperor Charles the Bald had established (*stabilivit*) should burn in hell with Judas, the betrayer of our Lord.<sup>138</sup> The prayers of beneficiaries were required first of all for the salvation of the souls and 'royal majesty' of the king who made these statutes, his predecessors and successors, and only secondly for the establishment (*stabilimentum*) of church and kingdom. The 'state of the king' was already anticipated in the spiritual health and authority of the ruler, on which the now commonplace 'state of the kingdom' was seen to rest.<sup>139</sup>

Just before his death in 882, Hincmar, the old councillor of the Emperor Charles the Bald and archbishop of Rheims for thirty-six years, addressed to his fellow bishops and King Carloman a tract on 'the government of the palace' (*De ordine palatii*). Hincmar had lived through the troubles of Louis the Pious's reign, the division of the realm after his death, and the attacks of the Vikings, but he still gave an idealized picture of Carolingian government. The ordering of the members of the palace—the king's family, the steward, butler, and constable, the pages and the vassals—is in fact only one part of it: the other part concerns the preservation of the state of the whole kingdom (*totius regni status*). To consider this, two *placita* are said to be held annually, the first a general assembly ordering the state of the kingdom for the immediate year (its *ordinatum* not to be changed except for some great necessity), the second a meeting of leading councillors only, to take thought for future years, the prospects for war or peace, and the deployment of the *marchiones* with responsibility for frontier areas. There was no consideration of the pleas of individuals before matters concerning the safety or state of the king and the kingdom generally (*quae generaliter ad salutem vel statum regis et regni pertinebant*) had been ordered.<sup>140</sup>

As much as allegiance to a traditional order, expressions of concern for 'the state of the kingdom' indicate fear for a country's future, and its ability to withstand military threats. But it is hard to see how that 'state' could have been imagined in the first place without the structure of courts and procedures created by the Frankish kings over the centuries

<sup>138</sup> *Karoli III Diplomata*, 202; cf. 66.18, 89.28, 122.9, 149.11 and 20, 304.31; also *Formulae*, 351.8, 352.27, 590.33.

<sup>139</sup> *Karoli III Diplomata*, 28.7, 33.18, 48.6, 53.21, 60.13, 68.19, 70.24, 82.5, 90.10, 146.4, 151.7, 153.17, 166.3, 171.7 and 30, 176.1, 183.15, 187.3, 194.9, 265.5, 275.16, 302.23.

<sup>140</sup> Hincmar von Rheims, *De ordine palatii*, ed. T. Gross and R. Schieffer, MGH Fontes Iuris Germanici Antiqui 3 (Hanover, 1980), 54, 56, 74, 82–90 (caps. 12, 13, 23, 28, 29–33; Janet Nelson, 'Kingship and Royal Government', ch. 15 of *The New Cambridge Medieval History*, ii. c.700–c.900, ed. Rosamond McKitterick (Cambridge UP, 1995), 420, 425–6.

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for the administration of justice and the preservation of peace within their territory. At any rate Hincmar used a language of 'state' not heard clearly again until royal justice re-established itself after a period of 'feudal' disruption.

### CHAPTER THREE

## The Courts of Lords and Townsmen

IN THEIR legal procedures, the Carolingians bequeathed a model of an ordered *status regni* to Western Europe, but the means of enforcing its authority were spread perilously thin over a vast territory.<sup>1</sup> The Carolingian empire was much smaller than its classical Roman ancestor, and counts, *missi*, and *scabini* made it a greater administrative reality. Yet its cohesion was only as strong as the emperor's control over local officials, achieved by incessant travel, the delegation of much authority to immune churches and great landlords generally, and continual emphasis on the obligation of personal fidelity to the ruler. In the three centuries after Charlemagne's death, at least in the territory of the west Franks which became known in the tenth century as France, the central exercise of power was pitted against an often brutal assertion of jurisdiction by local lords. The establishment of seignorial and urban courts nevertheless gave much greater depth to the administration of justice and marked an essential stage in the structuring of territorial states.

### THE GROWTH OF FEUDAL SOCIETY

Household vassals, sustained by grants of land, formed the hard professional nucleus of the Carolingian army and administration.<sup>2</sup> The emperor depended for the government of his lands on *fideles* who owed him direct allegiance. But his subordinates on each level of the official hierarchies of state and church—*missi* and archbishops, counts and bishops, *vicarii* and archdeacons—also needed their personal followings.<sup>3</sup> Carolingian order—perhaps the order of any state there has ever been—rested on these personal ties of loyalty as much as on the official chains of command. Charlemagne simply tried to make sure that it was on his person that individual loyalties were focused, using the *missi* to

<sup>1</sup> For a pessimistic assessment of the Carolingian achievement, see Ganshof, *The Carolingians and the Frankish Monarchy*, 257–8.

<sup>2</sup> P. Wolff, 'L'Aquitaine et ses marges', in *Karl der Grosse, Lebenswerk und Nachleben*, i. *Persönlichkeit und Geschichte*, ed. H. Beumann (Dusseldorf, 1965), 292; J. F. Verbruggen, 'L'Armée et la stratégie de Charlemagne', *ibid.* 421 ff.

<sup>3</sup> H. Fichtenau, *The Carolingian Empire*, tr. P. Munz (Oxford: Blackwell, 1957), 134 ff.; J. F. Lemarignier, *La France médiévale: Institutions et société* (Paris, 1970), 92.

take from the whole Christian people pledges of faith in himself as God's agent on earth.<sup>4</sup> Ambitious kings would always seek liege homage from the entire aristocracy,<sup>5</sup> but a man's strongest loyalties were directed to the immediate lord from whom he gained protection and sustenance. A chronicler like Astronomus, the biographer of Louis the Pious, looking back from the troubled times of the mid-ninth century to the settlement of Frankish counts and abbots and their followings in Aquitaine sixty years earlier, might bemoan the fact that these men 'whom they popularly call vassals' had always ignored the general interest and turned public property to private ends ('negligens autem publicorum, perversa vice, dum publica vertuntur in privata');<sup>6</sup> and the emperor might insist in 808 that all free men with four *mansi* of land should give him military service, under their lords (*seniores*, 'seigneurs') if they had lords who were also serving, but otherwise under the counts.<sup>7</sup> But kings knew that their rule depended on maintaining the sanctity of lordship at all levels. At the end of the ninth century, King Alfred declared a man's treachery to his lord the one crime for which there could be no compensation, 'because Almighty God adjudged none for those who scorned our Lord'.<sup>8</sup>

Louis the Pious's division of his lands between his sons cut through the unifying bonds of loyalty to a single sovereign, just at the time that the raids of the Vikings and Saracens upon the coasts of the empire demanded a drawing-together of local communities under their immediate lords. The old hierarchies of fidelity were put under strain, and the aristocracy were alarmed as even groups of peasants formed sworn associations for their mutual protection.<sup>9</sup> Attempts were made to see that the division of the empire did not destroy vassalage as a stabilizing force in society. The *Ordinatio imperii* of 817 insisted that a vassal should hold benefices from one lord only, 'to avoid discords'. A peace-agreement between the brother-kings in 847 reaffirmed both the public administration of justice through *missi* and the responsibility of lords for their men, Charles the Bald requiring that every freeman in his realm should have himself or one of his *fideles* as *senior*.<sup>10</sup>

<sup>4</sup> *Capitularia*, i. 66 (c. 2), 92 (c. 2).

<sup>5</sup> Cf. the oath taken by William the Conqueror at Salisbury in 1086 from 'all the land-holding men of any account throughout England, whosoever men they were': discussed by F. M. Stenton, *The First Century of English Feudalism* (Oxford UP, 1932), 111-13.

<sup>6</sup> Astronomus, *Vita Hludovici*, ed. E. Tremp, MGH Scriptores, 64 (Hanover, 1995), 302; tr. as *Son of Charlemagne* by A. Cabaniss (Syracuse UP, 1961), 34, 38.

<sup>7</sup> *Capitularia*, 137-8 (1, 9), 165 (7-9), 169 (7).

<sup>8</sup> Liebermann, *Die Gesetze der Angelsachsen*, i. 44-7 (49.7).

<sup>9</sup> J. M. Wallace-Hadrill, 'Frankish Gaul', in *France: Government and Society*, ed. Wallace-Hadrill and J. McManners (London, 1957), 44-6; *Annales Bertiniani*, ed. F. Grat, J. Vieillard, and S. Clemencet (Paris, 1964), s.a. 859, for the *vulgus promiscuum* who formed a *coniuratio*.

<sup>10</sup> *Capitularia*, i. 128 (10), 272 (9), ii. 22 (6), 68, 71 (2).

In the course of the tenth century, the Danes in England are described as 'bowing down' to the king of Wessex and accepting him as their lord.<sup>11</sup> Yet, as the kingdom of England expanded in this way, the kingdom of the West Franks was regressing from the level of public administration it had reached under the Carolingians, to rule by regional magnates. This could not be a mere reassertion of old patterns, however, because the public jurisdiction of the count and his official subordinates as Charlemagne defined it was now added to the territorial power of the landlords. Under Charlemagne, appointments to offices (*honores*) at all levels were accompanied by grants of land (*beneficia*) to support the office-holders and ensure their fidelity. If a count failed to do justice, or to turn out for a military expedition, his *honor* and his benefice were forfeited together, *proprium* as well as *ministerium*.<sup>12</sup> By the time Charles the Bald made provision for the government of his kingdom before setting out on a last pilgrimage to Rome in 877, it looks as though the situation was being reversed: the landed property bestowed on the counts and their subordinates was becoming the hereditary property of lineages, so that provision had to be made for the succession to offices which became vacant when the heirs were accompanying the king.<sup>13</sup>

Together, benefice and 'honour' (office) made up the units of landed power forming the basic element of what was much later characterized as 'feudal society'.<sup>14</sup> The old Germanic word *fehu*, *feoh*, meaning 'cattle' (or even a man's whole fortune, in seventh-century Lombardic and Anglo-Saxon laws),<sup>15</sup> takes on a new lease of life from about 950 onwards as *fevum* or *feudum*, referring it seems, at least in some of the earliest instances from Languedoc, to the territorial power of public origin which counts and viscounts had converted to their own uses—uses which included, of course, the giving of it to retainers in return for service, or to churches for the good of their souls.<sup>16</sup> In 961 the count of

<sup>11</sup> *The Anglo-Saxon Chronicle*, ed. B. Thorpe (Rolls Series, London, 1861), 190–1 (a. 914: 'gesohte him to hlaforde'), 195 (a. 918), 196 (a. 920), 212 (a. 946: 'p hic woldan eal p he wolde'), 217 (a. 959: 'him to bugan').

<sup>12</sup> K.-J. Hollyman, *Le Développement du vocabulaire féodal en France pendant le haut moyen âge* (Geneva and Paris, 1957), 34; *Capitularia*, i. 48 (9), 284, ii. 95–6.

<sup>13</sup> 13. *Capitularia*, ii. 358 (9,10).

<sup>14</sup> The early modern 'discovery' of feudalism is described by J. G. A. Pocock, *The Ancient Constitution and the Feudal Law* (Cambridge UP, 1957); cf. D. R. Kelley, 'De Origine Feudorum: The Beginnings of an Historical Problem', *Speculum*, 39 (1964), 224; P. Ourliac, 'La Féodalité et son histoire', *Revue historique de droit français et étranger*, 73 (1995); Susan Reynolds forcefully demolishes the feudalism imagined by some modern historians in *Fiefs and Vassals* (Oxford UP, 1994).

<sup>15</sup> Hollyman, *Développement du vocabulaire féodal*, 41, 43–4; Liebermann, *Die Gesetze der Angelsachsen*, i. 10 (6, 7).

<sup>16</sup> Niermeyer, *lexicon minus*, s.v. *feodum*, miles, 6, 7; C. Devic and J. Vaissete, *Histoire générale de Languedoc* (Toulouse, 1872–1904), ii. col. 421 (a.d. 954), v. nos. 48 (cols. 145–6;

Rouergue left in his will a castle which was held from him as a fief (*a feo*). In Catalonia a *fevum* or *fevum comitale* or 'public land which is commonly called feudal' (*alodem curialem quem vulgo dicitur fevalem*) appears to have been a portion of the king's property (*fiscus regis*) which was converted into the *fiscus comitis* and parcelled out to the count's *vicarii*. Whether as 'fiefs', 'alods' or 'benefices', lands from which tax had been collected for the king came to be regarded as belonging to counts and viscounts, who might demand for themselves the dues and service which these erstwhile officials had once received for the king.<sup>17</sup> The successors of the cavalrymen of Charles Martel and Charlemagne were the knights who garrisoned castles for the new race of counts, independent princes like the counts of Anjou, or the Viking counts of Rouen who became 'dukes of Normandy'.<sup>18</sup> Above all the exercise of justice was parcelled out into the hands of private lords.

Castles were the new element in the control of the land. 'It was the invasions of the Northmen or the Hungarians', Marc Bloch wrote, 'which, from the Adriatic to the plains of northern England, led not only to the repair or rebuilding of town ramparts, but also to the erection on every hand of the rural strongholds which were destined to cast a perpetual shadow over the fields of Europe'.<sup>19</sup> These fortifications were often just palisades enclosing villages or monasteries and providing refuge for the peasants and artisans who worked for the landlords, lay or ecclesiastical. In 911, the year in which he was later said to have conceded the country about Rouen to Hrolf's Norsemen in return for service 'by land and sea', King Charles the Simple permitted the bishop of Cambrai to build a castle and have a market and a mint, all with

a.d. 922), 160 (col. 341), 173 (col. 362). E. Magnou, 'Note sur le sens du mot *fevum* en Septimanie et dans la marche d'Espagne à la fin du x<sup>e</sup> et au début du xi<sup>e</sup> siècle', *Annales du Midi*, 76 (1964), 149, 152.

<sup>17</sup> Devic and Vaissete, *Histoire générale de Languedoc*, v. no. 111, col. 248, for the will of the Count of Rouergue: 'et illo castello de Parisio teneat Malbertus a feo de Hugone et de Ermengaudum dummodo vivit: et post discessum illorum, isti alodes remaneant . . .'; cf. *ibid.* nos. 77, 100, 106, 122 (col. 269: a.d. 972), 126 (col. 277), 132 (col. 290), 150 (col. 318: a.d. 990), 175 (cols. 366-8: a.d. 1018), 212 (col. 429: a.d. 1037), 278 (col. 546): the viscount of Narbonne acknowledges to the count of Barcelona: 'Habemus autem predictum fevum et omnia ad illud pertinentia per vestrum beneficium, sicut habuimus retroactis temporibus per comitem Barchinonensem . . .'; in Catalonia, the *fevum* or *fevum comitale* was a portion of the *fiscus regis* (royal treasure) which was converted into the *fiscus comitis* and parcelled out by the count amongst his *vicarii*: see J.-M. Font Rius, 'Détenion des châteaux en catalogne', *Les Structures sociales de l'Aquitaine, du Languedoc et de l'Espagne au premier âge féodal* (Colloque International du Centre National de la Recherche Scientifique, Toulouse, 1968: Paris, 1969), 67.

<sup>18</sup> Niermeyer, *lexicon minus*, s.v. *miles*.

<sup>19</sup> M. Bloch, *Feudal Society*, tr. L. A. Manyon (London, 1961), 300; for the evidence that seigniorial castles were proliferating by the 860s, see *Capitularia*, ii. 328.20, 360-1 (caps. 26, 27); cf. *Recueil des Actes de Charles II le Chauve*, 3 vols., ed. F. Lot and G. Tessier (Paris, 1943-55), i. 192.3, 241.7, for exemptions from tolls at *civitates* and *castella* on the Loire and Seine.



immunity from the attentions of duke, count, and judge, because of the perils from the northern barbarians and from internal strife.<sup>20</sup> The immunity renewed by King Lothar for the church of Notre-Dame du Puy in 955 introduces us to another term in growing use for a fortified settlement, often under the walls of a great church: the bishop of Puy was granted the whole *burgus* around his cathedral with the tolls collected there, a mint, and policing powers (*districtus*) over the inhabitants.<sup>21</sup>

*Burgi* were soon spread across Western Europe, from Magdeburg, the cathedral city founded by the emperor Otto I to spearhead German colonization eastward, to the *burhs* constructed by King Alfred and his successors to defend and then advance the boundaries of Wessex;<sup>22</sup> and to Dryburgh and Jedburgh in the Scottish border-country, where townships remain by the ruins of twelfth-century abbeys. The first *bourgs* were the settlements at the gates of cathedrals or suburban abbeys—the *burgus Sancti Martini* at Tours is mentioned from the first half of the ninth century—and it was possible for towns with more than one great church, like Caen and Bayeux in Normandy, or Durham in England, to have a number of *burgi* in the *suburbium*. At Caen, as at Cherbourg, there were also *burgi* attached to the ducal stronghold.<sup>23</sup> But the name was soon applied, in France at least, to rural settlements and market centres as well, some of the tiniest of which survived within their original bounds till the Revolution. The multiplication of *bourgs* was a phenomenon of the great demographic expansion which began in the tenth century. The factor uniting the different sorts was their common subordination to churches or castles, on the initiative of whose lords, ecclesiastical or lay, they were invariably created.<sup>24</sup>

Urban fortification was promoted by kings. In England, the repairing of *burhs* at Rogationtide was a public duty, and a fine for breaking the peace of a borough was laid down by royal edict. In Germany, the Saxon kings began to construct *burgi* for defence against the

<sup>20</sup> *Recueil des Actes de Charles III le Simple*, ed. F. Lot and Ph. Lauer, Chartes et Diplomes relatifs à l'histoire de France (Paris, 1940–9), i. 150–2 (no. 67) and cf. *ibid.* i. 16 (10); cf. also *Recueil des Actes de Louis IV*, ed. M. Prou and Ph. Lauer, Chartes et Diplomes (Paris, 1914), 4.25, 38.16.

<sup>21</sup> *Recueil des Actes de Lothaire et de Louis V*, ed. H. D'Arbois de Jubainville, L. Halphen, and F. Lot, Chartes et Diplomes (Paris, 1908), 12.

<sup>22</sup> For *bourgs* in general see R. Fossier, *Enfance de l'Europe* (Paris, 1982), 100, 226–8, 275, 544–9, 564–70.

<sup>23</sup> Hollyman, *Développement du vocabulaire féodal*, 82–4; L. Musset, 'Peuplement en bourg et bourgs ruraux en Normandie', *Cahiers de civilisation médiévale*, 9 (1966), 178–96; *Recueil des Actes des Ducs de Normandie de 911 à 1066*, ed. M. Fauroux, Mémoires de la Société des Antiquaires de Normandie, 36 (Caen, 1961), 73, 75, 119, 123, 130, 138, 182, 253–4, 281, 325, 346–8, 364, 407, 425, 426.5; M. Bonney, *Lordship and the Urban Community: Durham and its Overlords, 1250–1540* (Cambridge UP, 1990), 41–9.

<sup>24</sup> Musset, 'Peuplement en bourg', 186–7; Fossier, *Enfance de l'Europe*, 100, 226–8.

Hungarians. Sometimes it was an old Frankish palace that was fortified. With the decay of Carolingian power in the West, these seats of public authority became the hereditary possessions of counts and viscounts, but continued to dominate wide areas of country.<sup>25</sup> Then, in the tenth century, a second wave of castle-building ushered in more fundamental changes in society. The growth of rural bourgs accompanied the proliferation of strongholds belonging to a warrior-aristocracy in which many newly-risen families stood beside the old official dynasties. Often the castle of a rural lord was just a wooden tower on a mound or 'motte', within an enclosure or 'bailey': yet it has been calculated that the building of a respectable motte required the labour of fifty villagers for forty days, which in itself implies a draining of the old public jurisdiction and *corvées* into the hands of landlords.<sup>26</sup>

#### SEIGNORIAL JURISDICTION

Seignorial *incastellamento* followed different time-scales in different areas, and achieved varying intensities. It appears to have begun in the early tenth century in northern Italy, raided by both Hungarians and Saracens, and then spread to Provence.<sup>27</sup> Further north and west, dukes and counts were not constructing their own castles till about 1000 or later, when some of them managed to use castle-building to stop the further parcelling out of territorial power and actually consolidate new principalities. Fulk Nerra, who succeeded to the county of Anjou in 987, built many castles as he pushed out the boundaries of his lands (particularly eastward along the Loire towards Tours) and filled them with knights. His skill was in controlling the castellans who possessed these strongholds, whether as his officers, or as vassals calling the castles their own. But even in Anjou, there were by the 1060s lineages of castellans prepared to assert their landed rights against the count's right of disposition.<sup>28</sup>

In the Île de France, the king was at this same period struggling to impose his authority on a group of castellans from whom he would eventually draw the officers of his household and state. By the reign of

<sup>25</sup> Liebermann, *Gesetze der Angelsachsen*, i. 72-3 (40), 156-7 (13); Fossier, *Enfance de l'Europe*, 201, 204.

<sup>26</sup> Musset, 'Peuplement en bourgage', 188; the Bayeux tapestry shows the clearly wooden towers being set on fire during the campaign of duke William and earl Harold against the Bretons.

<sup>27</sup> Fossier, *Enfance de l'Europe*, 207.

<sup>28</sup> Richer, *Histoire de France*, 2 vols., ed. R. Latouche (Paris, 1930-64), ii. 292 (ch. 90); R. W. Southern, *The Making of the Middle Ages* (London, 1953), 80-9; O. Guillot, *Le Comté d'Anjou et son entourage au XI<sup>e</sup> siècle*, 2 vols. (Paris, 1972), i. 281-352, esp. 307-9 and 347-8; B. S. Bachrach, 'Enforcement of the *Forma Fidelitas*: The Techniques Used by Fulk Nerra, Count of the Angevins (987-1040)', *Speculum*, 59 (1984), 796-819.

King Robert the Pious in the early eleventh century the Carolingian *pagus* had broken up, at least south of the Seine, into a collection of castleries. Public authority was compromised still further by the possibility of a castellan's being the vassal of more than one overlord—as the Count of Anjou himself was vassal of both Hugh Capet and the duke of Aquitaine. The heads of old vicecomital families, and (later in the eleventh century) 'new men' amongst the castle-holders, began to call themselves 'counts'. The domains of the old Frankish abbeys were also breaking up, the castellans founding their own monasteries to sanctify their independent lordship. Under Philip I (1060–1108), the dislocation of the *pagus* spread to the old Carolingian heart-land north of the Seine. Subinfeudation produced a class of lesser castellans, called knights along with those who merely garrisoned the comital fortresses, and it was amongst these men that territorial surnames (e.g. 'Hervé de Montmorency') emerged, because there was no other way of distinguishing between the numerous Herveys, Hughs, and Roberts except by the names of their estates.<sup>29</sup>

Along with the castle and the *fevum comitale* on which it stood, *bannum* and *districtus*, the criminal jurisdiction and policing functions the *vicarius* (Fr. *viguier*) originally enjoyed as the agent of the count or viscount, became the property of a lineage.<sup>30</sup> The transference of jurisdiction from public to private hands and the evolution of the *seigneurie banale* is indicated by the change in meaning of 'customs'.<sup>31</sup> Under the Carolingians, *consuetudines* signified monetary impositions, often of public origin, for instance the duties which the king was accustomed to charge on river traffic, or the *fredus* he took for a breach of the peace. Only rarely before 1000 does an order that 'no count, viscount, judge or secular power shall presume to hear pleas, enforce laws or adjudge distraint' within an immunity surrender the 'law, justice and judgment' at all explicitly into the hands of an abbot.<sup>32</sup> But in the early years of the

<sup>29</sup> J.-F. Lemarignier, *Le Gouvernement royal aux premiers temps capétiens (907–1108)* (Paris, 1965), 47, 60, 68–72, 89–92, 121–3, 126–7, 131–4.

<sup>30</sup> J. Richard, 'Châteaux, chatelains et vassaux en Bourgogne au XI<sup>e</sup> et XIII<sup>e</sup> siècles', *Cahiers de civilisation médiévale*, 3 (1960), 433–47; C. Higounet, 'Structures sociales, 'castra' et castelnaux dans le Sud-Ouest aquitaine', in *Structures féodales et féodalisme dans l'Occident Méditerranéen (X<sup>e</sup>–XIII<sup>e</sup> siècles)*, Colloque internationaux du Centre National de la Recherche Scientifique (Paris, 1980), pp. 109–17; M. Gramain, "'Castrum': Structures féodales et peuplement en Biterrois au XI<sup>e</sup> siècle', *ibid.* 119–34; Font Rius, 'Détenition des châteaux en catalogne', 64–7.

<sup>31</sup> On the evolution of the *seigneurie banale*, see the classic article of J.-F. Lemarignier, 'La Dislocation du "Pagus" et le problème des 'Consuetudines' (X<sup>e</sup>–XI<sup>e</sup> siècles)', in *Mélanges Louis Halphen* (Paris, 1951), 401–10; but cf. Jane Martindale, 'His Special Friend'? The Settlement of Disputes and Political Power in the Kingdom of the French (Tenth to Mid-Twelfth Century), *TRHS*, 6th ser. 5 (1995) for the demonstration that the forms of Carolingian justice continued to be used in the localities.

<sup>32</sup> For the significant terms see Niermeyer, *lexicon minus*, s.v. *bannus*, 6, *consuetudo*, 4;

eleventh century the positive exercise of criminal justice emerged clearly amongst the *consuetudines*, the customary rights of lords, alongside the exaction of castle-guard duty from their free vassals and manorial payments from their 'customary' (or servile) tenants. This was the time when the *mallus* finally ceased to operate, when a new race of 'viscounts' was appearing with their private strongholds, and when the castle-seignory replaced the *pagus* as the basic unit of political and economic life. (In Flemish charters, *pagus* faded before *territorium*, meaning the area controlled by a castle, between 1020 and 1040.)<sup>33</sup> In 1008, the monks of Saint Denis got from King Robert the Pious a new charter which recognized, instead of a negative immunity from royal officialdom, their positive jurisdiction over cases of wounding and homicide and other offences inside and outside their *castellum*, their use of trial by battle (*lex duelli*), and all judicial powers within the abbey precinct.<sup>34</sup> To obtain this grant, the monks apparently exhibited the immunity they had received from Charles the Bald in the ninth century, in which they had inserted an extra clause giving them 'other legal customs' (*consuetudines legum*).<sup>35</sup>

From the disintegrating public authority of the Carolingian king and his official counts the castellans inherited the comprehensive jurisdiction enjoyed by the Frankish *vicarii* over the peasantry, which their castles allowed them to enforce with a brutal effectiveness. Although capitularies had forbidden vicars and hundredmen to hear disputes concerning property and free status or serious criminal cases, the counts seem to have left their subordinates to exercise complete powers over the humbler classes, in vicarial assemblies which corresponded in function to the hundred courts of England.<sup>36</sup> These assemblies had disappeared by the early eleventh century, and in some regions *vicariae* had come to

*districtio, districtum, districtus*; and examples in *Diplomata Ludowici Germanici [etc.]*, 94.20: *vel freda aut bannos exigendo*, 159.10, 211.45; *Actes de Charles III le Simple*, 99.25, 257.17; *Actes de Lothaire et de Louis V*, 12.13, 35.11: protection for an immune monastery 'cum omnibus fredis et bannis sive concessis', 83.9, 133.5: 'neque bannum nec freda nec ullas districtiones faciendas'; 151.12: grant to Rheims, 974: 'omnis lex, justicia atque iudicium manu regularis abbatis contineatur vel ejus arbitrio'; 159.25: grant 'cum omni districtu et integritate totius libertatis').

<sup>33</sup> Lemarignier, 'La Dislocation du "Pagus"', 402.

<sup>34</sup> Ibid. 404: 'hoc est bannum hominis vulnerati vel interfecti ac infracturam intra vel extra castellum . . . et legem duelli . . . ac totam procinctam.'

<sup>35</sup> L. Levillain, 'Études sur l'abbaye de Saint-Denis', *Bibliothèque de l'École des chartes*, 87 (1926), 89, 95: 'Itaque hanc totam procinctam Deo sanctoque ejus Dionysio donamus cum omni videlicet judiciaria potestate, hoc est bannum omnemque infracturam, et, si que sunt alie consuetudines legum ubicumque infra totam predictam procinctam . . . concedimus.'

<sup>36</sup> G. Duby, 'Recherches sur l'évolution des institutions judiciaires pendant le x<sup>e</sup> et le xi<sup>e</sup> siècle dans le Sud de la Bourgogne', *Le Moyen Âge*, 52 and 53 (1946-7): repr. in his *Hommes et structures du moyen âge*, 7-60; Niermeyer, *lexicon minus*, sub v. *vicaria*, 2; F. Lot et R. Fawtier, *Histoire des institutions françaises au moyen âge*, i. *Institutions seigneuriales* (Paris, 1957), 11, 42.

mean just groupings of villages which were the subjects of land-grants or paid customary dues to landlords.<sup>37</sup> The charters of early eleventh-century Anjou, on the other hand, show vicarial powers still very much in use by the territorial agents of the new-style dynasty of counts. The Angevin *vicarii* sometimes held castles for the count, but the extension of the comital estates, particularly under Geoffrey Martel (1040–60), demanded a more numerous corps of officials to police town and country under *prepositi* (*prévôts*, provosts) set up at Angers, Tours, Vendôme, Saumur, and other centres. One of the main functions of both *vicarii* and *prepositi* was to execute judgment on the parties defeated in judicial duels.<sup>38</sup> When he founded the abbey of Beaulieu, Count Fulk Nerra (d. 1039) exempted from all customs both the lands already possessed and those it should later acquire, and gave the monks the *vicaria* for cases of bloodshedding, robbery, and all other offences, with all the fines and profits arising from it. Judicial duels between the monks' servants and the inhabitants of their *bourg* were to be held on the monks' land, duels between their servants and knights or men of the count, at the latter's castle of Loches, though the abbot was to pay no fines to provost or vicar when his men were defeated there.<sup>39</sup>

In making grants of *vicaria* to private lords it was unusual at this period for the count not to hold back jurisdiction over 'the four cases' of homicide, rape, arson, and robbery,<sup>40</sup> or else 'the *vicaria* of sixty shillings'—the amount of the penalty imposed by Charlemagne for serious crimes.<sup>41</sup> Justice over criminals could still be regarded as one amongst a number of public responsibilities, but it was fast becoming a form of property—both a major source of profit to the landlord, and a means of controlling the human resources of his domain. Like pieces of land, portions of vicarial jurisdiction might be bought and sold and held in benefice.<sup>42</sup> In the north the status of the *vicarius* gradually changed to that of a seignorial agent, collecting for his lord the fines due from offenders, and (in civil cases) from the losers in judicial duels (or from both sides if they made settlements before trial); and the scope of his justice was ultimately limited to the serfs born into the lord's

<sup>37</sup> L. Halphen, 'Les Institutions judiciaires en France au XI<sup>e</sup> siècle: Région angevine', *Revue Historique*, 77 (1901), 303; Guillot, *Le Comté d'Anjou et son entourage au XI<sup>e</sup> siècle*, i. 398–403.

<sup>38</sup> Guillot, *Le Comté d'Anjou*, ii. 59–60 (no. 66).

<sup>39</sup> Ibid. ii. nos. 6, 17, 39, 66, 80, 356, 368.

<sup>40</sup> Ibid. ii. no. 381: only some of the four cases (e.g. rape and arson) might be reserved; see J.-P. Poly et E. Bournazel, *La Mutation féodale X–XII<sup>e</sup> siècles* (Paris, 1980), 87–91, for the varying local definitions of the four cases.

<sup>41</sup> Guillot, *Le Comté d'Anjou*, ii. nos. 89, 200, 372; *Capitularia*, i. 72 (cc. 8,9), 224 etc.; in England, a 60-shilling fine was set in Alfred's laws for breaking the peace of the *burh* or stronghold of a bishop or alderman *quem Latine comitem vel seniore[m] dicunt*: Liebermann, *Gesetze der Angelsachsen*, i. 72–3 (Af. 40).

<sup>42</sup> Guillot, *Le Comté de Anjou*, ii. no. 80.

*potestas*.<sup>43</sup> As a seignorial official, he survived to later centuries as the 'voyer', associated by a false etymology with the policing of the roads in his *voierie*, and ascribed the duty of keeping the ways open for merchants and others travelling 'from town to town, and one castle to another'.<sup>44</sup> In the south of France, on the other hand, it is possible to watch the *viguers* turning into a petty nobility.

And everywhere the powers of the old *vicarii* over the peasantry, now exercised by the ubiquitous *prévôts*, gave the lordship its backbone: before it was an economic unit, the *seigneurie* was the area in which the lord judged, taxed, and requisitioned soldiers, labourers and supplies.<sup>45</sup> It was around 1100 that the castellan's powers of *bannum* (authority to punish offenders against the public peace) and *districtus* (power to enforce judicial orders, typically by 'distraining' the goods of recalcitrant offenders) were being converted most vigorously into economic rights: to demand payment from village-communities for protection (*salvamentum*) and eventually impose an arbitrary tax (tallage, *taille*) on their members as his serfs; to billet on the peasantry his agents, with their horses and hunting-dogs; to take fodder for the horses of his men-at-arms; to exact carting and ploughing services on his 'demesne' or home farm; and to compel the use of his forge and wine-press, ovens, mills, and markets.<sup>46</sup> At the same time, a multiplicity of land-transactions was splitting into distinct layers the jurisdiction which was at the root of all the lords' other powers. The clerk who, some time after 1155, made up a charter of the tenth-century King Lothar for the monastery of Saint-Cyprian of Poitiers stipulated that land in a certain *vicaria* was granted with all *vigeria*, both high and low (*alta et*

<sup>43</sup> Guillot, *Le Comté de Anjou*, ii, nos. 89, 133, 145, 229, 241, 251, 311; *Recueil des Actes de Henri II, Roi d'Angleterre et Duc de Normandie concernant Les Provinces Françaises*, ed. L. Delisle et E. Berger, 4 vols. (Paris, 1909-27), i, 213.13; Halphen, 'Les Institutions judiciaires', 304-5; Lot et Fawtier, *Institutions seigneuriales*, 42-3, 80, 251, 328; R. Boutruche, *Seigneurie et féodalité*, 2 vols. (Paris, 1959, 1970), ii, 269; *Les Établissements de Saint Louis*, ed. P. Violette, 4 vols. (Paris, 1881-6), i, 165-6.

<sup>44</sup> Philippe de Beaumanoir, *Coutumes de Beauvaisis*, ed. A. Salmon, 3 vols. (Paris, 1970-4), i, 367 ff. (paras. 718 ff.); Niermeyer, *lexicon minus*, s.v. *viatura*; F. Godefroy, *Dictionnaire de l'ancienne langue française et de tous ses dialectes du IX<sup>e</sup> au XV<sup>e</sup> siècle* (Paris, 1881-1902), s.vv. *voier*, *voierie*; see examples in *Recueil des Actes de Philippe Ier*, 1059-1108, ed. M. Prou (Paris, 1908), 311.2, for the king's grant of justice and *voirie* (*viariam*) in a vineyard; *Recueil des Actes de Philippe Auguste*, ii, ed. H.-Fr. Delaborde, Ch. Petit-Dutaillis, et J. Monicat (Paris, 1943), 289 (a. 1202), and iii, ed. M. J. Monicat et M. J. Boussard (Paris, 1966), 74 (a. 1207) for dealings in what is termed both *viatura* and *viaria*.

<sup>45</sup> Boutruche, *Seigneurie et féodalité*, ii, 268.

<sup>46</sup> G. Duby, *La Société aux XI<sup>e</sup> et XII<sup>e</sup> siècles dans la région maconnaise* (Paris, 1963), 205 ff., 584 ff.; and his *Rural Economy and Country Life in the Medieval West*, tr. C. Postan (London, 1968), 187-9, 224-31; Guillot, *Le Comté d'Anjou*, i, 400-3; Niermeyer, *lexicon minus*, s.vv. *salvamentum* (6-8) and *talear* (3); see *Recueil des Actes de Philippe Ier*, 150.22, 179.21, 266.7, 278.12, 400.17, for examples of the inclusion of justice along with the economic rights of lordship.

*bassa*).<sup>47</sup> An interpolation in a royal charter of 1177 x 1182 has the King of England likewise granting land to the monastery of Savigny 'with all justice high and low and all right and lordship, with all liberties and free customs'.<sup>48</sup> A hierarchy of justice was developing from the hierarchy of land-holding. The castellan's peace-keeping authority over the inhabitants of his *salvamentum* began to be diffused by sub-infeudation to lesser lords. When he alienated land, a castellan might keep back justice, but he might also alienate judicial rights separately from land, especially round the periphery of his lordship—even selling the higher jurisdiction while retaining the lesser as a means of disciplining the serfs on his demesne. Towards the end of the thirteenth century, the jurist Philippe de Beaumanoir defined 'basse justice' as that held as a fief from a lord who possessed 'haute justice', but had to admit that the jurisdictions of landlords were so intermeshed (*entremellées et enclavées*) that there were endless arguments about the rights of seignorial bailiffs to pass through foreign lordships in pursuit of offenders, and about what arms they could carry.<sup>49</sup>

The lesser justice which every landlord might aspire to seems generally to have included the execution of thieves, which was a matter of policing rather than of deliberation before judges. (The village courts, in which the peasants themselves did the judging, spent their time exacting fines for their lords for offences against local bye-laws, awarding damages for 'civil' injuries inflicted by one householder on another, and settling disputes concerning peasant land-tenure.) In the Maconnais, a lord who could exact fines right up to the 60s. level as well as execute thieves, could be reckoned to have 'grande voirie'—not just 'basse' but also 'moyenne justice',<sup>50</sup> but the actual trial of cases of theft might still be regarded as a matter for *haute justice*. The staging of judicial duels normally remained the castellan's prerogative, but theft was the one capital offence for which people could be condemned without trial, if they were caught with the loot, or were simply notorious for their

<sup>47</sup> *Recueil des Actes des Ducs de Normandie*, ed. Fauroux, no. 1 (p. 68).

<sup>48</sup> *Recueil des Actes de Henri II*, ii. 186.31: 'cum omni justicia alta et bassa et omni jure et dominio, cum omnibus libertatibus et liberis consuetudinibus et quietanciis suis'; cf. 519.20, in which high justice is retained by the king.

<sup>49</sup> Boutruche, *Seigneurie et féodalité*, ii. 132; Duby, 'Recherches sur l'évolution des institutions judiciaires', 30–1; Halphen, 'Les Institutions judiciaires', 304; Beaumanoir, *Coutumes de Beauvaisis*, i. 459, ii. 344–5 (paras. 910, 1650, 1653).

<sup>50</sup> Beaumanoir, *Coutumes de Beauvaisis*, i. 441, ii. 340–1 (paras. 865, 1642); *Établissements de Saint Louis*, ed. Viollet, iii. 309; *Coutumiers de Normandie*, ed. E.-J. Tardif, 3 vols. (Rouen, 1881–1903), 1, i. 35 and ii. 31 (cap. xli of *Le Très Ancien Coutumier*); *Les Olim ou Registres des Arrêts rendu par la Cour du Roi*, ii, ed. Comte Beugnot (Paris, 1842), 445: 'esset discordia coram nobis, super bassa jurisdictione usque ad sexaginta solidos'; Duby, *La Société dans la région maconnaise*, 590; Boutruche, *Seigneurie et féodalité*, ii. 134; G. Dupont-Ferrier, *Les Officiers royaux des bailliages et sénéchaussées en France à la fin du moyen âge* (Paris, 1902), 827–9.

thieving. The gallows rather than the court were thus the symbol of the ordinary landlord's justice.<sup>51</sup>

Seignorial justice stemmed from the castles, but in the twelfth and thirteenth centuries it was becoming attached to landed estates at all levels. The *Établissements* of St. Louis described the common situation where a lord gave a vassal a fief in the castlery of another baron. Then, the vassal did homage to the donor for his fief, but to the castellan for 'his *vaarie* and his justice'.<sup>52</sup> In 1260, even the Count of Blois was compelled to prove in the king's court his jurisdiction in cases of robbery and murder in a village where the provost of Corbeil maintained he lacked rights of castlery (*non habet castellaniam*).<sup>53</sup> What was at issue in the endless disputes about jurisdiction was often the profit rather than the substance of justice—for instance, the right of the Abbess of Saint-Pol to the chattels of one of her men, hanged at Montmorency as a thief, which she maintained against the castellan of Montmorency in 1269, as something belonging to her 'high and low justice'.<sup>54</sup> But rights of justice were clearly becoming embedded in the hereditary property of others than the counts and castellans. Even high justice was diffusing wider, and the possession of it becoming the mark of the whole social class above the village lords. Landlords who were not castellans, perhaps those on the periphery of castleries first of all, were left to deal with the thieving and mayhem, and even the killings and rapes, of their villeins, who would in any case be tried by the ordeals of hot iron and cold water rather than by battle. Many bishops and other great churchmen such as the Abbot of Saint Denis had their own castles and with them justice high and low.<sup>55</sup> The charters of kings, renewed and supplemented in successive reigns, enormously complicated the pattern of justice and inspired a multitude of conflicts between ecclesiastical lords on the one hand and lay barons, royal bailiffs, and urban magistrates on the other. The settlement of a dispute between the nuns of Fontevrault and their neighbour William of Montsoreau, which Henry, King of England and count of Anjou, confirmed in 1182, gave the nunnery the *vigeria*, but left justice in all crimes punished by death or mutilation to William (canon law frowned on its direct exercise by churchmen)—the nunnery would simply get the fines incurred and the chattels forfeited by its own men.<sup>56</sup>

<sup>51</sup> *Établissements de Saint Louis*, ed. Viollet, i. 516, ii. 61, 447–8, iii. 247, 309–11; Beaumanoir, *Coutumes de Beauvaisis*, i. 146–7, 437, 459, 461, ii. 340 (paras. 295, 853, 909, 914, 1641); *Recueil des Actes de Henri II*, ii. 80, 228, 263; J. Boussard, *Le Comté d'Anjou sous Henri Plantagenet et ses fils* (Paris, 1938), 38–40.

<sup>52</sup> *Les Établissements de Saint Louis*, i. 377, 518–19, ii. 206–7; Duby, 'Recherches sur l'évolution des institutions judiciaires', 30.

<sup>53</sup> *Les Olim*, i, ed. Comte Beugnot (Paris, 1839), 106–7 (vii), 158 (viii).

<sup>54</sup> *Ibid.* i. 328–9 (xv).

<sup>55</sup> See e.g. *Cartulaire de L'Abbaye de Savigny*, ed. Bernard, 233 (no. 430).

<sup>56</sup> *Recueil des Actes de Henri II*, ii. 227–9 (no. 618); for the Montsoreau family, see



## JUSTICE IN THE TOWNS

A treaty in 1190 between Richard I, king of England and count of Anjou, and Philip Augustus, king of France and patron of the cathedral church of Saint-Martin, set down the judicial customs of the city of Tours. The count's *viarius* came to Chateaufort twice a year to hold 'the justice of the castle', hearing cases along with 'a servant of the king of France or of the treasurer of Saint-Martin' from after high mass on the feast of St. Peter and St. Paul (29 June) till after high mass on the next feast of St. Martin (Martinus calidus: 4 July) and from All Saints Day (1 November) to St. Brice's Day (about 13 November). Duels ordered at these terms should take place in the castle moat. The count's court should also—without delay and exacting no fines—preside over the duels adjudged outside these terms in the treasurer's court and the courts of other lords in the castlery (*de castro*). But trials by the ordeals of water or fire should be undergone at the church of Saint-Martin's *burgus* of Saint-Pierre-le-Puellier;<sup>57</sup> and the dean and chapter of Saint-Martin possessed pleas of 'blood, riot, robbery, murder, and all other high justice' over the peasantry on their tenants' lands.<sup>58</sup>

A third element in addition to the courts of the lay lords and the churches made up the judicial pattern: the communal institutions of townsmen. The justice administered by the townsmen for themselves was again vicarial in origin—a public responsibility delegated to urban officials by counts and castellans. In central France we last hear of *viarii* and *sub-viarii* in the towns of the Loire, at Orleans, Tours, Saumur, and Angers. When power to establish a *bourg* was granted to a monastic community, greater or lesser vicarial powers might be given with it.<sup>59</sup> In 1075, King Philip I confirmed a forty-year-old grant by which Gelduin of Saumur had given the abbey of Pontlevoy a church, all the serfs who worked for it, and 'all the customs of a borough, *census* and *vicaria*, toll and *pedagium*'.<sup>60</sup> Some twelfth-century lords found it convenient to pass on to their burgesses the right to settle cases of *basse justice* between townspeople themselves.<sup>61</sup>

Boussard, *Le Comté d'Anjou*, 38–40; *Les Olim*, ii. 351 (xxxix), for the citing of a series of charters from successive kings.

<sup>57</sup> *Recueil des Actes de Philippe Auguste*, i. 41–3 (no. 361, caps. 26, 33–4); Boussard, *Le Comté d'Anjou*, 54–5.

<sup>58</sup> *Recueil des Actes de Philippe Auguste*, iii. 420–1 (no. 1293).

<sup>59</sup> Guillot, *Le Comté d'Anjou*, i. 401, ii. nos. 57a, 66, 89, 264, 350; *Ordonnances des Roys de France de la Troisième Race*, i, ed. M. de Laurière (Paris, 1723), 2.

<sup>60</sup> *Recueil des Actes de Philippe Ier*, 189–90; cf. *Recueil des Actes de Philippe Auguste*, i. 296–7 (no. 242).

<sup>61</sup> Duby, 'Recherches sur l'évolution des institutions judiciaires', 34–5.

Borough enfranchisement was spurred on by the formation of sworn communes of townsmen, like that at Laon suppressed by King Louis VI in 1114 after three terrible years during which the castellan and the bishop were murdered, the cathedral burnt, and the city ravaged by a neighbouring lord, Thomas de Marle. After another fourteen years, the same king restored the commune by charter, for both the Capetian kings of France and the Angevin kings of England in their French lands saw the need to harness the political energies of the burgeoning towns, especially where the two dynasties confronted each other.<sup>62</sup> At the end of the twelfth century and the beginning of the thirteenth, bands of towns to the north of Paris—Senlis, Crépy-en-Valois, Soissons, and Rheims; Beauvais, Roye, and Noyon; Amiens, Corbie, Péronne, and Saint-Quentin; Arras and Tournai—had their communal privileges (often acquired some time earlier) confirmed by the charters of Philip Augustus.<sup>63</sup> The bourgs of the Angevin territories generally obtained more restricted privileges, despite the energetic foundation of new towns, but Rouen won a commune from Henry II by the defence its inhabitants put up against Louis VII in 1174, and the Queen-Dowager Eleanor and her son King John gave the defence of their sovereign rights as well as the rights of the townsmen as the reason for granting communal status to Poitiers, Fécamp, Harfleur, and other places at the turn of the century. When Philip Augustus captured Normandy from King John in 1204 and encroached upon the rest of ‘the Angevin empire’, he was quick to confirm Rouen’s privileges, which he gave in a reduced form to Falaise and Pont-Audemer, and to send a copy of the grant (*rescriptum communie Rothomagensis*) to ‘all his faithful men sworn of the commune of Poitiers’.<sup>64</sup>

The new political role of the urban communities was recognized by the concession of liberties which were in the first place judicial, though by Beaumanoir’s time it was the fiscal arrangements that needed most explanation. Guibert of Nogent asserts that the clergy and magnates of Laon deceived the populace into adopting ‘that new and detestable name of commune’ in 1111, using promises that all servile exactions would be abolished and only the fines paid to the town authorities for law-breaking retained; and so by legal chicanery they kept the people in their original subjection.<sup>65</sup> The mark of a commune changed from the

<sup>62</sup> Guibert de Nogent, *Autobiographie*, ed. E.-R. Labande (Paris, 1981), 321 ff.; J.-F. Lemarignier, *La France médiévale: Institutions et société* (Paris, 1970), 184.

<sup>63</sup> Charles Petit-Dutaillis, *Les Communes Françaises* (Paris, 1947), 38–9, 95 ff.

<sup>64</sup> Maurice Beresford, *New Towns of the Middle Ages* (London, 1967); *Gallia christiana*, 16 vols. (Paris, 1716–1865), xiv. 177; J. Boussard, *Le Gouvernement d’Henri II Plantagenet* (Paris, 1956), 181–92; *Recueil des Actes de Henri II*, ii. 83; *Recueil des Actes de Philippe Auguste*, ii. 362–7 (no. 789), 443–6 (no. 858).

<sup>65</sup> Beaumanoir,  *Coutumes de Beauvaisis*, ii. 266–75 (ch. 50); Guibert of Nogent, *Autobiographie*, 320–1, 324–5; Petit-Dutaillis, *Les Communes Françaises*, 38 ff.

swearing of an oath of solidarity by the townsmen as a whole, to the receipt of a royal charter which gave the magistrates the same sort of power over the urban proletariat as a feudal landlord enjoyed over the peasantry.<sup>66</sup> But underlying the urban commune there was another and more basic form of association ('l'autre manière de compagnie', in Beaumanoir's words) in which people joined to secure by common effort the necessities of life: to repair their mills and pathways, maintain their wells, provide watchmen, and undertake the 'other things which are done by common accord, such as paying the costs of pleas to maintain their right and guard their customs'.<sup>67</sup>

The king often confirmed the judicial rights which lords began to grant to the men of their castleries, or villages, or clusters of villages, and promised to enforce them against the lords themselves; and he conceded similar rights to towns of his own.<sup>68</sup> The customs granted by King Louis VI to his men of Lorris, and confirmed by King Philip in 1187 after the town and its charters had been burnt while the king was staying the night there, allowed the amicable settlement of disputes between the burgesses without fines to the king or his provost. The king would grant more positive judicial rights to towns if he was paid enough. Beaune and five other villages accepted a doubling of their *taille* and other customary dues in order to have 'an institution of peace' from Philip Augustus, and become a commune.<sup>69</sup> Philip's confirmation of the customs enjoyed by the men of the whole *potestas* of Bruyères shows what *pacis institutio* gave. The mayor and jurats were to exact reparation from inhabitants who committed injuries within their 'power' (*potestas*); and they could even seek vengeance on malefactors from outside Bruyères whose lords refused to do justice, though in these cases they normally lacked the commune's special sanction—the pulling-down of the culprits' tenements. The jurats would decide both the penalty for breach of the communal peace and the compensation to be paid to the injured party (which might include a wounded man's medical expenses); the latter was not permitted to seek other vengeance if he disdained what was offered. Those accused of homicide and maiming were to be tried by ordeal ('divine justice'; 'the judgment of cold water') and the guilty man 'lose a head for a head and a limb for a limb'—or redeem himself according to the judgment of mayor and jurats as to the victim's worth.<sup>70</sup>

<sup>66</sup> Beaumanoir, *Coutumes de Beauvaisis*, paras. 646 (i. 322–30), 1517 (ii. 266).

<sup>67</sup> Ibid., para. 647.

<sup>68</sup> *Recueil des Actes de Philippe Auguste*, i. 225–8 (nos. 188–9), ii. 37–8 (no. 503), iii. 394–5 (no. 1270).

<sup>69</sup> Ibid. i. 244–5 (no. 202, cc. 12, 14, 160), ii. 71 (no. 529, c. 13), 72–4 (nos. 530–1), 78–80 (no. 536), 284–6 (no. 716).

<sup>70</sup> Ibid. i. 235–40 (no. 197, cc. 4–15), ii. 78–80 (no. 536); for the pulling down of offenders'

Royal approval of the efforts of communities to settle feuds was given with caution, since the judicial rights of neighbouring lords were thereby threatened. Yet to give the greater communes the same sort of judicial responsibility as their feudal neighbours and make their leaders *jurati pacis*—sworn to maintain the king's peace rather than their own independence—was an excellent way of bringing the turbulent communes under control. Carolingian *scabini* survived in the older towns, at Saint-Quentin still presided over by a *vicomte*, and could be used to supervise the jurats or magistrates.<sup>71</sup> At Arras the twelve *scabini* who enforced the sixty-shilling ban along with the king's justice, and by a complicated process elected their successors to serve for fourteen months at a time, seem in fact to have been very much the commune's officials. And at Rouen and Falaise a hundred 'peers' chose twenty-four jurats to serve for a year, half as *échevins* and half as councillors (*consultores*): the mayor and *échevins* were to meet twice a week to deal with the business of the city of Rouen, or of the castle of Falaise, asking the advice of the councillors in matters of difficulty. In the *pacis institutio* and commune of Tournai, the *scabini* or *échevins* appear to have been eclipsed by the thirty self-perpetuating *jurati*, two of whom were the town's provosts.<sup>72</sup>

Some towns acquired a freedom to administer their own justice in the matters of greatest importance to them to such an extent as to make them another 'estate' of the realm along with the lay and ecclesiastical lords. Over serfs, the mayor and jurats had the same 60s. jurisdiction as the average landlord. Towards the end of the thirteenth century, *parlement* (the new high court of the French king) would even hold that the townsmen of Senlis had been entitled to try, condemn, and bury alive a woman who had drugged people in order to steal from them.<sup>73</sup> Freemen could be tried for crimes (including homicide which did not amount to houses by communes, see i. 269 (no. 224, c. 1), ii. 16 (no. 491, c. 13), 84 (no. 540, cc. 4, 9), 365 (no. 789, c. 11), iii. 22 (no. 977, c. 1), 205 (no. 1117, c. 5); for trial by ordeal and punishment of life or limb, see i. 270–1 (no. 224, cc. 1, 2, 14), 334 (no. 279, c. 13), 565 (no. 473, cc. 1–2).

<sup>71</sup> Ibid. i. 15 (no. 10), iii. 537 (no. 1386); for the commune as 'institution of peace', see i. 269 (*burgensibus nostris Tornacensibus pacis institutionem et communiam dedimus*), 325 (*pacem et communiam donamus burgensibus Sancti Richarii*); for the *scabini* in the towns, ii. 18 (no. 491, c. 27); Beaumanoir, *Coutumes de Beauvaisis*, ii. 266 (para. 1517); Niermeyer, *lexicon minus*, s.v. *juratus*.

<sup>72</sup> *Les Olim*, i. 537–8 (iii), 541–2 (xv), ii. 78–9 (ii); *Recueil des Actes de Philippe Auguste*, i. 272–3 (no. 224, cc. 27, 29), 490 (no. 408), 565–9 (no. 473, cc. 1, 2, 8, 9, 20, 45), ii. 15 (no. 491, c. 1), 18 (no. 491, cc. 4, 27), 195 (no. 642, c. 2), 258 (no. 694: but ordinary homicide is tried by the mayor and commune), 275 (no. 706, c. 18), 363 (no. 789, c. 3), 365 (no. 789, c. 14), 444 (no. 858, c. 31), iii. 24–6 (no. 977, cc. 9, 11, 12, 20, but see p. 206, no. 1117, c. 10, where it is the king's justice who puts the thief in the pillory), 205 (no. 1117, c. 10), 324 (no. 1112), 343 (no. 1229).

<sup>73</sup> *Recueil des Actes de Philippe Auguste*, i. 271 (no. 224, c. 14), 567 (no. 473, c. 23); *Les Olim*, i. 537–8 (iii), ii. 78–9 (ii).

premeditated murder), using compurgation or other forms of the ordeal than the duel (though these did require the assistance of the clergy to invoke God's judgment); and the special sanctions of banishment and destruction of the offenders' houses could be deployed as effectively as exacting a limb for a limb. But the magistrates' chief object was to reconcile a killer with his victim's kin and prevent feuds. At Tournai those who killed and maimed were permitted to return if they made reparation to the kindreds, and paid £10 and £5 respectively to the municipality. One suspected of hatred or rancour was to give security for good behaviour to the provost or be deemed an enemy of the city (*inimicus civitatis*). It was open to the provost and jurats to decide that a boy who accidentally killed another boy was not answerable.<sup>74</sup> For killing a house-breaker there was no fine to the commune. Even the king's jurisdiction in cases of rape might be modified, to the extent that townsmen could be empowered to see that the ravisher married the woman and was reconciled to her kin.<sup>75</sup>

Jurisdiction over one type of violent crime was recognized as especially important to a commune. Beaumanoir instructs the lord of a town not to allow hatreds to smoulder into affrays (*mellées*) between families in the community, even if neither side complains. The citizens of Rouen were granted 'all pleas and all affrays within the liberty of Rouen and within the banlieue of Rouen in which death or maiming (*mehaigniez*) or other plea of the sword was not in question, provided also that they were not prosecuted by wager of battle, and saving the rights of landlords'.<sup>76</sup> It is difficult to believe that the saving clauses were always observed in the heat of an urban riot. According to Beaumanoir, those who inflicted wounds in a brawl should be kept in prison for forty days until the injured were seen to have recovered, and for that period it was uncertain whether the case belonged to the *haute* or the *basse justicier*. Yet the law did not prescribe hanging for one who killed in *chaude mellée*, unless he was accused and defeated in battle by the victim's kinsman, and *parlement* ruled that jurisdiction over theft and 'simple killing' was a necessary part of *viaria*, the policing of the streets. In urban conditions, substantive distinctions between crimes began to replace social distinctions amongst the justices and the judged as determinants of jurisdiction.<sup>77</sup>

<sup>74</sup> *Recueil des Actes de Philippe Auguste*, i. 269–71 (no. 224, cc. 1–16), 334 (no. 279, c. 11), 567 (no. 473, c. 23); cf. Petit-Dutaillis, *Les Communes Françaises*, 47 ff., for the high justice enjoyed by the commune of Tournai.

<sup>75</sup> *Recueil des Actes de Philippe Auguste*, iii. 26 (no. 977, c. 20).

<sup>76</sup> Beaumanoir, *Coutumes de Beauvaisis*, ii. 269–70 (914, 1523); *Recueil des Actes de Philippe Auguste*, ii. 446 (no. 858, c. 50), iii. 24 (no. 977, c. 9), 59 (no. 1000, c. 23); cf. ch. 58 of *Le Très Ancien Coutumier: Coutumiers de Normandie*, ed. Tardif, i, i. 49 and 2, ii. 46): *De Meslees* in the Latin text and *D'Assaut* in the French; *Les Olim*, ii. 317 (xviii).

<sup>77</sup> Beaumanoir, *Coutumes de Beauvaisis*, para. 1646 (ii. 312), and cf. para. 823 (i. 428–9);

In civil disputes—though the separation of ‘civil’ from ‘criminal’ meant little when the main object was always to preserve the community’s peace—towns needed still greater freedom of action. Even the king’s men could be arrested for debt in a town ‘ruling itself by law’ (*regente se per legem*).<sup>78</sup> Procedures for collecting debts from knights or their servants bulk large in communal charters. At Saint-Quentin, the mayor could order a debtor of one of the burgesses to have his lord arrange a duel about a contested debt, and if he did not the échevins would give a remedy; burgess creditors had to accept *abandon* (the return of the goods not paid for). If a debt contracted at Rouen was not paid, the mayor could seize the debtor’s goods and harness as soon as he descended from his horse. The commune itself could enforce payment of an acknowledged debt, but had to rely on the king’s *bailli* to act if the debt of an outsider was disputed. At Péronne, the mayor and jurats were empowered to call upon a knight to repay his debt to a burgess, and if he would not they could ban him from the town and stop his credit there; the creditor could be awarded the debtor’s goods, but if a knight contested the seizure the échevins would decide the case on the authority of king or castellan. At Rouen and Falaise even land cases could be judged by the mayor and the échevins, if the lords of the disputed tenements did not ‘claim their courts’ and ‘do right’ to claimants within a month.<sup>79</sup>

The jurisdictional liberties of the communes were a final product of the draining of Carolingian public justice down to local lordships. In England the control the Norman and Angevin kings kept over castle-building, and in Spain the use of castles by the kings of Leon and Castile (‘the land of castles’) in the centuries-long war against the Moors, kept the development of seignorial and borough jurisdiction within narrower boundaries than in France.<sup>80</sup>

*Établissements de Saint Louis*, ed. Viollet, ii. 44, iii. 13, 294; *Les Olim*, ii. 353–4 (vi), 376 (xxiii).

<sup>78</sup> *Les Olim*, i. 83 (xvii).

<sup>79</sup> *Recueil des Actes de Philippe Auguste*, i. 271–2 (no. 224, c. 18), ii. 19 (no. 491, cc. 35, 37), 273–4 (no. 706, cc. 6, 7, 10, 11), 366–7 (no. 789, cc. 22, 24), iii. 25 (no. 977, c. 15), 57 (no. 1000, c. 5), 354–5 (no. 1237, c. 34), 545 (no. 1389, c. 23).

<sup>80</sup> For Spain, see A. Mackay, *Spain in the Middle Ages* (London, 1977), 51–3; *Colección de fueros municipales y cartas pueblas de los reinos de Castilla, Leon, Corona de Aragon y Navarra*, ed. F. Muñoz Romero (Madrid, 1847); J. Rodríguez, *Los Fueros del reino de Leon*, 2 (Documentos) (Ediciones Leonesas, n.d.), 15–23 (no. 2, cc. 20, 24, 40–2), 67–71 (no. 19); Jose M. Font Rius, *Cartas de poblacion y franquicia de Catalunya*, 1 (Textos) (Madrid, 1969); Luis G. de Valdeavellano, *Curso de historia de las instituciones españolas*, 5th edn. (Madrid, 1973), 515–16, 518–24, 537–40, 551; in *Las Siete Partidas*, ‘vicarios’ is used in the general sense of ‘the officials who act in place of emperors, kings and great lords in the provinces, counties and large towns, when these cannot be there in person’: *La Segunda Partida*, título I, ley 13, in *Los Códigos españoles concordados y anotados*, 12 vols. (Madrid, 1847–51), ii. 332; ii. 402, 433–54 (*Segunda Partida*, título XIII, ley 22, and título XVIII, for the holding of castles for the Crown; iii. 33 [*Tercera Partida*], III, 5) for the *casas de corte*; iii. 49, 382 (IV, 18,

## COMPETITORS FOR JURISDICTION AND POWER

It is from France, at any rate, that we have the best evidence for the transformation of the public offices of Carolingian justice into the fiercely-guarded liberties of landlords and urban communities. We know how precious judicial liberties became, from observation of the long-running disputes and short-lived compromises about them between churches, lay lords, communes, and royal officials recorded in the charters and legal records of the twelfth and thirteenth centuries. Occasionally it was possible to settle the issue by sharing jurisdiction in a particular place two or even three ways. The abbeys of Saint-Denis and Saint-Germain both claimed justice of *voirie* at Charlieu, until it was agreed in *parlement* in 1270 that Saint-Germain should have justice over 'light injuries' such as abusive words, Saint-Denis over atrocious affrays stopping short of homicide, and the king over homicide.<sup>81</sup>

Amongst lords, a few of the disputes were between knight and knight,<sup>82</sup> but more of them were between one church and another and caused by the translation of ancient immunities into positive jurisdictions through royal grants which were oblivious of territorial boundaries and ecclesiastical hierarchy. The conflicts of churchmen were often between bishops and religious communities. The abbey of Saint-Rémi was confirmed in immunity *ab omni aliena justitia et potestate* in 1090, and in 1197 the archbishop of Rheims granted that his reeves would not arrest the men of the abbey as they passed to and from their *bourg*, except in open crime and provided they answered to the abbot's justice; yet in 1265 it would be decided in *parlement* that only the archbishop had gallows for hanging thieves in the *banleuca* of Rheims, and that the abbot and the monks should hand over to the royal custodians of the vacant see the body of a man who had hanged himself, leaving their claim to 'all manner of justice' in their lands to be tried when there was a new archbishop.<sup>83</sup> In 1317 the two ecclesiastical corporations at odds in the king's court were the abbey of Saint Germain des Prés and the rector of the university of masters and scholars of Paris, and the jurisdiction they disputed was justice high and low in the Clerks' Meadow under the abbey walls and in some houses by it, in which the scholars had suffered violence. The king ordered that the meadow be taken into

XXXI, 5) for *merum et mixtum imperium*; iii. 586 (*Quinta Partida*, IV, 9) for royal grants of towns, castles, and justice.

<sup>81</sup> *Les Olim*, i. 363–4 (v), and cf. ii. 594–5 (vi), in which a hospital is awarded the *voyeria* of a township and parish, and the king takes all other *justicia alta et bassa*; Duby, *La Société dans la région maconnaise*, 214 ff.: 'La Concurrence entre les Seigneuries Banales'.

<sup>82</sup> Duby, *ibid.* 218.

<sup>83</sup> *Recueil des Actes de Philippe Ier*, 305 (no. cxx); *Les Olim*, i. 622–3 (xvi).

his hands until there had been an inquiry as to the jurisdiction and the injuries, and that it be kept decent for the enjoyment of the scholars and other Parisians, as in the past, no cattle pasturing in it.<sup>84</sup>

Most frequent of all conflicts over jurisdiction amongst landlords were those which opposed churches to lay aristocrats. The concentration of territorial power in the hands of castellans threatened the ancient ecclesiastical immunities. The age-old tendency of the lay neighbours of churches to annex the estates of the bodies they were supposed to defend, exemplified by the Carolingian *advocati*, was further encouraged by the giving of new responsibilities of *guardia* or *custodia* to the castellans. The rules of 'the peace of God' laid down by ecclesiastical councils in the tenth and eleventh centuries show a wish both to use the castellans' policing power and to curb their imposition of 'bad customs' (*malae consuetudines*), by which was meant the assertion over the churches' servants of a vicarial jurisdiction only appropriate to a servile peasantry. The peace of God movement, at least in the Midi, can be seen as a defence of monastic interests against increasingly predatory lay lords who passed to their children the 'franchises and voiries and all the customs and authority' they had received from their parents.<sup>85</sup>

In the north of France, talk of bad customs appeared at the end of the tenth century, at the same time as (good) customs began to take on a positive connotation in the charters. By a grant to the church of Saint-Maurice in 994, Count Fulk of Anjou remitted the *malae consuetudines* which had been introduced since his father's day; and on his accession in 1040, Count Geoffrey Martel held a *generale placitum* concerned with 'the curbing of depredations and the correcting of wicked encroachments on the lands of the saints, and of bad customs imposed beyond what is due'. Within the next few years Duke William of Aquitaine granted a hamlet to the abbey of Saint-Jean d'Angély 'free of all bad customs and of *vicaria*'.<sup>86</sup> King Philip I gave a judgment at Compiègne in 1066 against Aubri de Coucy, who, under guise of advocacy and by evil custom (*advocatoria et consuetudine iniqua*), had been

<sup>84</sup> *Les Olim*, ii. 670-2 (xxiii-xxiv); cf. i. 125-6 (i): a bishop against a monastery, leaving the former with *magna* and the latter with *parva iusticia*.

<sup>85</sup> Fichtenau, *The Carolingian Empire*, 142-3; Duby, *La Société dans la région maconnaise*, 215, 220-1; Elisabeth Magnou-Nortier, 'Les Mauvaises Coutumes en Auvergne, Bourgogne Méridionale, Languedoc et Provence au XI<sup>e</sup> siècle', in *Structures féodales et féodalisme dans l'Occident Méditerranéen (X<sup>e</sup>-XIII<sup>e</sup> siècles)*, 135-72, esp. 140, 148; cf. *Cartulaire de L'Abbaye de Savigny*, 444 (no. 835): a lay lord is to have a third and monks two thirds of the profits of cases and duels which they take to the lay court (c.1090); *ibid.*, pp. 475, 478-82 (nos. 900, 903-5), for the oppression of the monastery by a castellan, who has taken hostages from the abbot and encroached upon his jurisdiction (c.1117-21); and pp. 491-3 (no. 916) for the plea of a prior against a *vicarius*, settled before the abbot and fifteen clerical and lay witnesses (1127).

<sup>86</sup> Guillot, *Le Comté d'Anjou*, i. 370-3, ii, nos. 6, 20, 26, 92, 110, 130, 241, 368.



trying to appropriate the lands of the abbey of Saint-Médard at Soissons, claiming to be entertained anywhere within them, to compel the peasants to come to his justice and the knights to go with him to war, and (worst of all) to exercise jurisdiction over the merchants and wine-dealers of Flanders when they came to Saint-Médard to trade.<sup>87</sup> King Philip II remitted to monastic communities '*vicaria* and all other unjust customs' imposed by his provosts against earlier kings' grants of exemption from 'all secular disturbance and power'. Philip Augustus also arranged arbitration between the dean and chapter of Chartres and the Countess of Blois in a dispute about jurisdiction, in particular about 'a man whose ear was cut off' (as a convicted thief), which was held to turn on which party had *magnam justiciam* in a certain township.<sup>88</sup>

Jurisdiction over thieves was a usual source of contention. In Louis IX's reign, *parlement*, the king's high court, is found deciding that the monks of Longpont did not have justice over thieves caught on their lands and must restore a *latronissa* to the knight who did.<sup>89</sup> The capture of a thief in the act apparently gave the count of Nevers jurisdiction against the prior of Saint-Étienne of Nevers, even as to the fact of the delinquent's clerical status. On the other hand, the bishop of Autun had to release an offender he maintained was his clerk, because he was not arrested committing the wrong (*in presenti delicto deprehensus*), and also because the prior of La Charité claimed him as his burgess, who had renounced his clergy on marriage, held courts in criminal cases, and participated in many judgments of blood.<sup>90</sup> Julian of Péronne repulsed the suit of the dean and chapter of Noyon for jurisdiction over the public ways (*justicia viarum publicarum*) in Montaucourt, for that place was neither a city nor a castlery, and no tolls were collected on those roads: he held the land there from the king, so that high and low justice was his 'by common law' (*de jure communi*).<sup>91</sup>

Bishops, abbots, and priors as lords of urban communities of clerks and laymen, had to contend for their liberties not only against territorial lords, in which case they sometimes had the townsmen's help, but also against the communes (which were backed on occasion by their royal patron). The bishop of Beauvais was in trouble in *parlement* in 1278 because he had allowed a citizen to pose as his officer, seize a horse in

<sup>87</sup> *Recueil des Actes de Philippe Ier*, 79–83 (xxvii, a. 1066), and cf. 138.27 (li), 141.18 (lii), 170.7 (lxiv), 194.20 (lxxvii).

<sup>88</sup> *Recueil des Actes de Philippe Auguste*, i. 439 (no. 361, c. 8), iii. 9–10 (no. 967); in *Les Olim*, i. 53 (xl), an abbess defeats a lay lord's claim to *simplex justicia* over his men living in her village.

<sup>89</sup> *Les Olim*, i. 26–7 (xv), 221–3 (vi–viii).

<sup>90</sup> *Ibid.* i. 304–5 (iv), 878–9 (xxxiv).

<sup>91</sup> *Ibid.* i. 378 (vii); cf. ii. 82 (xvi) for a right of *viaria*, viz. the seisin of a thief, successfully asserted by a knight against an abbey.

distrain for a debt to himself, and fraudulently as well as forcibly prevent the castellan's servant from exercising the office.<sup>92</sup> Five years later, the bishop went again to the king's court and successfully claimed jurisdiction in the case of an assault on the mayor of Beauvais by one of the *jurati*, although the mayor pleaded that he was the king's servant and had suffered the injury on the public business of the commune.<sup>93</sup> The abbot of Corbie had long since fallen out with the commune of clergy, knights, and burgesses, for which his predecessor had helped to gain Louis VI's approval back in the early twelfth century. Philip Augustus confirmed his grandfather's grant to the townsmen of Corbie in 1180, but ten years later he was promising the monks that they should not lose by it, and that he would sort out their differences with the commune when he returned from Crusade. Yet in the 1260s the mayor was successfully claiming an extension of the boundaries of the commune's justice to include a neighbouring village, although it was at the expense of a territorial lord as well of the abbey, and had reportedly been achieved with the help of a mob shouting 'communia, communia'. After more disputes, *parlement* at last decided the general issue of the division of jurisdiction in Corbie between the commune and the abbey. In 1300, 'having heard the parties and seen their documents and privileges', it held that the monks had jurisdiction as lords of the town over suits for the restitution of tenements and of goods and chattels, that they could take security for the appearance in court of burgesses who withheld customary dues or sold bad wine or bread or used false measures, and that they could execute the judgments of the *scabini* upon them. The mayor and the jurats were left with a police-jurisdiction over criminal injuries (*de crimine seu delicto*) accompanying property disputes, and complaints of breach of contract if merchants brought them to the municipal court.<sup>94</sup>

#### THE PLACE OF THE KING

What was the basis of royal authority in this society, where the meaning of *libertas* was no longer a defined immunity from interference by the king's or the bishop's officers but rather the exercise of positive 'free customs' by lords and communes? What jurisdiction belonged to the king, the 'lord paramount', beside the settling of the tenurial disputes of

<sup>92</sup> *Les Olim*, i. 325 (xi), ii. 111 (iii)

<sup>93</sup> *Ibid.* ii. 225-6 (ix).

<sup>94</sup> *Recueil des Actes de Philippe Auguste*, i. 14-15 (no. 10), 445 (no. 362), 453 (no. 368), iii. 480 (no. 1339); *Les Olim*, i. 204 (vi), 268-9 (ii), 325 (xi), 646 (ix), 672 (xvii), 820-1 (xv), ii. 111 (iii), 225 (ix), 445-7 (vii), 480-1 (ii-iii).

tenants-in-chief of the Crown, which was no more than the tenants-in-chief themselves did for their tenants in their 'honour-courts'?<sup>95</sup>

At the Norman Conquest, many of the *consuetudines* of France crossed to England; there too landlords were given rights of public justice by the Norman and Angevin kings, though these normally stopped at hundredal jurisdiction and the hanging of thieves caught on one's land. But the grants or 'acts' of both the Capetian kings of France and the Norman dukes who became kings of England show that talk of 'the state of the kingdom' had not entirely disappeared. Confirming, with the authority of the Pope and in a solemn assembly, the gift of the church of Saint-Symphorien of Autun to the abbey of Saint-Benoît-sur-Loire, Philip I of France could still claim in 1077 that it was for the king's majesty to amend 'the state of the realm' in morals and laws, and the king's business to care for the clergy so that they would pray continually for the *status regni*.<sup>96</sup> Philip's contemporary, William, duke of Normandy, could talk of confirming 'the state of his principality' by his ratification of the gifts of lands, customs, and legal fines made by his vassals to found a monastery.<sup>97</sup> In the first quarter of the twelfth century, William's youngest son, Henry, as king of England, gave a church to the priory founded by his uncle at Montacute in Somerset, for the salvation of the souls of his father and mother and other ancestors 'and for the health and preservation of myself and for the state of the kingdom'; and in 1133, as Duke of Normandy, he gave a mill to the hospital of St. John at Falaise in perpetual alms, *pro remissione peccatorum meorum, pro statu quoque et incolumitate regni mei*.<sup>98</sup> But there is no mention of 'the state of the realm' where it might have been expected, in Henry I's coronation charter setting out the rights of his vassals generally. Stephen granted his demesne manor of Ripton in

<sup>95</sup> *Formulae*, 39.15 for *privilegium libertatis*; for the development of 'liberty', see *Recueil des Actes de Philippe Ier*, 141.26, 305.20, 430.3; *Recueil des Actes de Henri II*, i. 70.4 (cum omnibus libertatibus et liberis consuetudinibus), 151 (xlix), 161 (lix), 223 (cxvii), 269.3, ii. 93, 107.19 (cum omnibus aliis regiis libertatibus et consuetudinibus ad me pertinentibus); Harding, 'Political Liberty in the Middle Ages', esp. p. 428; for honour-courts, see F. M. Stenton, *The First Century of English Feudalism, 1066-1166*, 2nd edn. (Oxford: Clarendon Press, 1961), 42, 44-51, 54-5.

<sup>96</sup> *Recueil des Actes de Philippe Ier*, p. 225 (lxxxvi), and cf. p. 235 (xci): 'Statutum est autem hoc a nostra maiestate, sperantes quia, cum devote providemus utilitati ecclesie, summus opifex invigilabit in regni nostri tuitione, famulorum Dei qui ibidem congregati fuerint opitulante oratione.'

<sup>97</sup> *Actes des Ducs de Normandie*, ed. Fauroux, 317-18; it is interesting that the Anglo-Norman chronicler Orderic Vitalis has two English earls who rebelled against William in 1075 wishing that 'the state of the kingdom of Albion should be restored [*status regni Albionis redintegretur*] in all respects as it was in the time of the virtuous King Edward': *English Lawsuits from William I to Richard I*, ed. R. C. van Caenegem, Selden Soc. 106, 107 (London, 1990-1), i. 17.

<sup>98</sup> *Regesta Regum Anglo-Normannorum*, ii. *Regesta Henrici Primi 1100-1135*, ed. C. Johnson and H. A. Cronne (Oxford: Clarendon Press, 1956), 348 (clx), 378 (cclxx).

Huntingdonshire to Ramsey Abbey 'for the soul of King Henry and for the salvation of myself and my wife and my children and for the salvation [not 'the state'] of the whole realm'. Stephen's opponent, the Empress Matilda, made a political point in the summer of 1141 by granting lands and rents at Oxford to Oseney Abbey 'for the state and stability of the kingdom of England and for the health and safety of my lord the count of Anjou and my children and my own and for the soul[s] of king Henry my father and queen Matilda my mother and our ancestors and for the salvation of my soul and the remission of my sins'.<sup>99</sup> But in the feudal world most royal charters to churches were coming to follow the terms of grants to laymen, in which prayers for the state of the kingdom could not be asked: the same terms, indeed, as of the mass of grants made by lesser lords with no kingdoms to preserve in stability.

The salvation of the souls of the grantor and the members of his family as individuals remained the motive expressed for gifts to the church at all social levels.<sup>100</sup> What threatened to disappear in feudal society was the sense of the metaphysical status of the kingdom. The intention that grants should last *in firma stabilitate* continued to be affirmed, particularly in royal confirmations.<sup>101</sup> But in the more economical type of charter which displaced the diploma in both England and France, lords (including the king) registered the permanence of their grants simply by affirming that they were to be held 'in perpetuity' or 'in free, pure and perpetual alms',<sup>102</sup> if they were made to churches, and 'hereditarily' or 'in fee and heredity' or 'by hereditary right', if they were made to lay vassals.<sup>103</sup>

Yet the 'feudal mutation' which began to slacken as the eleventh

<sup>99</sup> *Regesta Regum Anglo-Normannorum*, iii. *Regesta Regis Stephani ac Mathildis Imperatricis ac Gaufridi et Henrici Ducum Normannorum 1135-1154*, ed. H. A. Cronne and R. H. C. Davis (Oxford: Clarendon Press, 1968), nos. 591, 592, 629, 667.

<sup>100</sup> For examples: *Regesta*, ii. 316 (xlvi), 322 (lxiii), 324-5 (lxxv), 374 (cclvi), 375 (cclx), iii. nos. 16, 376; T. Madox, *Formulare Anglicanum* (London, 1702), pp. iv, 238 (cccxcvi), 250 (ccccxxii).

<sup>101</sup> *Recueil des Actes de Philippe Ier*, 233-4 (xc); *Recueil des Actes de Philippe Auguste*, i. 190 (no. 157), 263 (no. 217), 367 (no. 304); *Regesta Regum Anglo-Normannorum*, ii. 324-5 (LXXV); *Reading Abbey Cartularies*, 2 vols., ed. B. R. Kemp, Camden 4th Ser. 31, 33 (London: Royal Historical Society, 1986-7), i. 47-8, 51, 52, 61, 64, 67.

<sup>102</sup> For examples, see Madox, *Formulare Anglicanum*, 238 (CCCXCVI); *Regesta Regum Anglo-Normannorum*, iii. nos. 16, 376; M. L. Delisle, *Recueil des Actes de Henri II concernant Les Provinces Françaises: Introduction* (Paris, 1909), 152-3; *Recueil des Actes de Philippe Auguste*, i. 3 (no. 2), 157 (no. 128), 183 (no. 152), 259 (no. 213), ii. 43 (no. 509), 44 (no. 510), 68 (no. 528), 170 (no. 623), 173 (no. 626).

<sup>103</sup> John Hudson, *Land, Law and Lordship in Anglo-Norman England* (Oxford: Clarendon Press, 1994), pp. 77-85; for examples: *Regesta Regum Anglo-Normannorum*, ii. 322 (LXIII), 374 (CCLVI), 375 (CCLX), iii. no. 274; *English Historical Documents*, ii. 1042-1189, ed. D. C. Douglas and G. W. Greenaway (London, 1953), 926 (no. 252); *Recueil des Actes de Philippe Auguste*, ii. 9 (no. 485), 92 (no. 542), 99 (no. 548), 100 (no. 549), 111 (no. 560), 226 (no. 669).

century drew to a close left conditions which the anointed kings of France and England could exploit for the rebuilding of their states.<sup>104</sup> Firstly, since *consuetudines* originated in Carolingian public power, there remained a sense that it was for kings to confirm landlords in possession of them. Secondly, as kings had learnt by the twelfth century, grants of customs might be used to create, alongside the rural communities under the seignorial *ban*, collective lordships of merchants supplying new kinds of material and ideological support for royal government.<sup>105</sup> And, thirdly, the violence that was intrinsic to feudal aggrandizement, when it was curbed and harnessed by politically skilful royal overlords, would provide the energy of a new system of justice. The crucial disputes about the holding of lands and the liberties attached to them were not settled by abstract legal rules but by a mixture of traditional procedures, force, and negotiation within groups of feudatories, and the king's political power was essential to the implementation of the compromises that were reached. Trial by battle or ordeal might be awarded in an overlord's court and then called off, so that peace could be arranged by the counsel of the friends of both parties. Monasteries in dispute with neighbouring castellans did not seek legal victories which the courts were powerless to enforce, but rather agreements witnessed as fair by the local community, which held out a better promise of long-term peace.<sup>106</sup> Thus around 1124 Thomas de Saint Jean made an agreement with the monks of Mont-Saint-Michel in Normandy, whose lands he had been invading and woods destroying in order to build the castle of Saint-Jean-le-Thomas. Thomas had come to the abbey in a fury (*furibundus*), when he heard the clamour to God for justice against him, but the counsel of his vassals and the monks' resolution brought his submission and restoration of the abbey's demesne lands and *consuetudines*; he asked only to keep the service of the knights related to him in blood. On another day he came back, 'with the bishop of Avranches and many other barons', to work out detailed terms with the monks, which included monetary compensation for Thomas's concessions. Later, the agreement was taken to Argentan, so

<sup>104</sup> For recent debate about the nature and dating of 'the feudal mutation', see: Guy Bois, *La Mutation de l'an mil* (Paris, 1989): tr. Jean Birrell as *The Transformation of the Year One Thousand* (Manchester UP, 1992); Chris Wickham, 'Problems of Comparing Rural Societies in Early Medieval Western Europe', *TRHS*, 6th ser. 2 (1992), at 245-6; Dominique Barthelemy, 'La Mutation féodale a-t-elle eu lieu', *Annales ESC* (1992), 767-77; T. N. Bisson, 'The 'Feudal Revolution'', *Past and Present*, 142 (1994), 6-42, and the subsequent debate in *Past and Present*, 152 and 155 (1996-7).

<sup>105</sup> For the place of the *ban* in the formation of rural communities, see L. Genicot, *Rural Communities in the Medieval West* (Baltimore: Johns Hopkins UP, 1990), ch. 3; *Recueil des Actes de Philippe Auguste*, *passim*.

<sup>106</sup> Stephen D. White, '"Pactum . . . Legem Vincit et Amor Judicium": The Settlement of Disputes by Compromise in Eleventh-Century Western France', *American Journal of Legal History*, 22 (1978), 281-308.

that it could be approved by 'the most pious and glorious King Henry' and witnessed by the archbishop of Rouen, the bishops of Lisieux and Bayeux, the king's steward and butler, and other dignitaries.<sup>107</sup>

Kings encouraged peace-making by arbitration, confirmed the land-transactions of their vassals, forbade the infringement of their own grants whether by custom or by violence, and were looked to more and more for the sanctions which would make violent self-help unnecessary.<sup>108</sup> At the same time ideals of social order propagated by churchmen stretched royal jurisdiction way beyond the property disputes of the aristocracy and enlisted the courts of lords and communes in the service of the king's peace.

<sup>107</sup> *Regesta Regum Anglo-Normannorum*, ii. 191 (1422), 351-2 (CLXXIV), and cf. *English Lawsuits*, ed. Van Caenegem, nos. 15, 138, 163(d), 225, 252, 325, 451, 458, 467, 478, 485, 499, 554, 573, 584, 598, 562, for other examples of arbitration and compromise in English cases, mostly under the aegis of the king or his justices.

<sup>108</sup> *Actes des Ducs de Normandie*, ed. Fauroux, pp. 134 (no. 35); *Regesta*, ii. 315 (xl), 332 (xcvii); *Reading Abbey Cartularies*, i. 61.

#### CHAPTER FOUR

## The Spread of the Organized Peace

#### THE PEACE OF GOD

Ensuring the peaceful state of the church and realm was an ancient obligation of western kingship. When Louis the Pious had shown himself incapable of preventing his three sons from pulling the Carolingian commonwealth apart, he was condemned by the Church as a disturber of the peace (*perturbator pacis*). At the nadir of royal power to the west of the Rhine in the tenth and eleventh centuries, the bishops themselves took the initiative in the defence of peace.<sup>1</sup> The chroniclers' descriptions of the fervent assemblies, at which the relics of the saints were paraded and great shouts of 'Pax, Pax, Pax' sent up,<sup>2</sup> show the aspirations of the peace movement quickly transcending the original purpose to protect church property. The legislation of episcopal councils for its enforcement throughout whole dioceses gave the ideal of peace a new social depth and territorial definition.

It was promoted first by bishops drawn from the nobility of southern France. At provincial councils held by the archbishops of Narbonne and Bordeaux in 989–90, the robbers of churches and unarmed clerks were anathematized, but also those who stole the goods of the peasantry. The 'Miracles of Saint Vivian' describe a 'meeting of the saints and an infinite gathering of people' in the Auvergne at this period, to make provision 'for the state of the commonwealth and the establishment of an unbreakable peace' (*pro statu rei publicae ac pacis inviolabili firmitate*); in the diocese of le Puy bishop Guy summoned a *placitum Dei* to apply the council's decisions.<sup>3</sup>

<sup>1</sup> On the peace movement generally, see H. Hoffmann, *Gottesfriede und Treuga Dei*, MGH Schriften 20 (Stuttgart, 1964); H. E. J. Cowdrey, 'The Eleventh-Century Peace and Truce of God', *Past and Present*, 46 (1970); T. Head and R. Landes (eds.), *The Peace of God: Social Violence and Religious Response in France around the Year 1000* (Ithaca, NY, and London: Cornell UP, 1992).

<sup>2</sup> Rodolfus Glaber, *The Five Books of the Histories*, tr. J. France (Oxford: Clarendon Press, 1989), 194–7.

<sup>3</sup> *Analecta Bollandiana*, 8 (1889), 263–4; *Sacrorum Conciliorum Nova et Amplissima Collectio [Concilia]*, ed. J. D. Mansi (Venice, 1759), xix. 89–90, 103–4; Hoffmann, *Gottesfriede*, 17; C. Lauranson-Rosaz, 'Peace from the Mountains: the Auvergnat Origins of the Peace of God', in *The Peace of God*, 104–34; R. Bonnaud-Delamare, 'La Paix en Aquitaine au XI<sup>e</sup> siècle', in *La Paix*, Recueils de La Société Jean Bodin, 14 (Brussels, 1961), i. 415–87.

The traditional role of the bishops as protectors of the poor and weak required courage and political skill in a world where the secular powers were both the problem and the necessary support for churchmen. Adhemar of Chabannes traces the beginning of the peace movement at Limoges to a pestilence in 994 which inspired a meeting of the bishop and the abbot of the monastery of Saint Martial with Duke William of Aquitaine. A fast was proclaimed and all the bishops of the duchy gathered at Limoges, bringing with them the relics of the saints. The body of Saint Martial, the patron of Gaul, was taken from its tomb, joy was immense, every infirmity ceased, 'and a pact of peace and justice was formed between the duke and the princes'.<sup>4</sup> The first canon of a council of bishops and abbots called by Duke William at Poitiers at some date between 1000 and 1014 records that a general 'restoration of peace and justice' was established by the duke and the nobles. They ordained that an invader of another's property should come before a judge in the pagus and make restitution, or else he should find pledges (*obsides*, hostages) that he would do so; if he refused, a council of princes and prelates together would order his excommunication and the seizure of his goods until he submitted.<sup>5</sup>

In other parts of France the bishops sought to 'reform the peace and restore the state of the catholic faith' on their own, or with the help of the king and his enfeebled authority. Rodolfus Glaber describes the spread of the movement from council to council, 'to Arles and Lyons, then across all Burgundy into the furthest corners of the French realm', as the glory of the first millennium.<sup>6</sup> Bishop Fulbert of Chartres wrote to pledge his assistance to King Robert the Pious as long as he worked for 'justice, peace, the state of the kingdom and the honour of the church'; and again to express his delight that Robert intended to hold a council with the princes of the realm 'for the sake of establishing peace'.<sup>7</sup> A council held in the early 1020s at Verdun on the Saône had particular importance, because the peace-oath of more than twenty headings which was exacted from the 'unnumbered multitude of nobles and plebeians of both sexes' assembled there was carried to the north of France by two bishops attending from the province of Rheims.<sup>8</sup>

<sup>4</sup> Adhemar of Chabannes, *Historiarum Libri Tres*, III, cc. 35, 69 in *Patrologia Latina*, ed. J.-P. Migne, vol. cxli (Paris, 1880); D. F. Callahan, 'The Peace and the Cult of the Saints in Aquitaine in the Tenth and Eleventh Centuries', in *The Peace of God*, 165–83.

<sup>5</sup> Mansi, *Concilia*, xix. 267, 502 ff.; Hoffmann, *Gottesfriede*, 39.

<sup>6</sup> Glaber, *Histoires*, 194–7; *Recueil des historiens des Gaules et de la France* (23 vols., Paris, 1737–1876), x. 171–2 (*Ex historia Episcoporum Autissiodorensium*, cap. 49), 233 n.

<sup>7</sup> *The Letters and Poems of Fulbert of Chartres*, ed. and tr. F. Behrends (Oxford: Clarendon Press, 1976), 34–5, 170–1.

<sup>8</sup> C. Pfister, *Études sur le règne de Robert le Pieux (996–1031)* (Paris, 1885), 170; Hans-Werner Goetz, 'Protection of the Church, Defense of the Law, and Reform: On the Purposes and Character of the Peace of God, 989–1038', in *The Peace of God*, 261–73.



The developed peace-oath did not attempt the impossible task of suppressing the private wars of the aristocracy completely, but rather the moderation of their consequences for churches and the mass of the population. Those who swore the oath assumed an obligation not to threaten the livelihood of the peasantry by destroying their mills and uprooting their vines; villagers' beasts might still be killed to feed the lord and his retinue, but their goods must not be distrained for their lords' debts; buildings were not to be set on fire unless they were known to hold enemy knights or criminals; merchants, pilgrims, widows, noblewomen travelling without their husbands, huntsmen, fishermen and seamen were to go on their way unmolested; and during Lent, according to the oath, a knight who was unarmed should also be free from attack, and wrongs should not be pursued violently until time had been allowed for getting justice by agreement.<sup>9</sup>

The oath extended the concept of wrongs against the public peace, but also made more urgent the question of enforcement. It was 'because of the weakness of the king (*imbecillitas regis*), the precarious state of the kingdom, and the confounding of people's rights' that the bishops of Beauvais and Soissons proposed to introduce the methods of the Burgundian bishops into the province of Rheims in 1023.<sup>10</sup> Opposition came, however, from Gerard, bishop and count of Cambrai, who objected that everyone swearing the oath would be laid open to the sin of perjury; also that the two bishops encroached on the rights of the king and confounded the state of holy church, which had been put under the dual authority of king and priest. It was for the king to combat sedition, calm wars, and spread the enjoyment of peace, Gerard asserted: for bishops to admonish kings to fight manfully in defence of their countries (*patriae*) and to pray that they might win. The see of Cambrai, though in the province of Rheims, looked to the empire, and Gerard had been brought up in the imperial chapel at Aix. He understood the *status ecclesiae* and the *status imperii* as synonyms for Christian society, within which king and bishop each had a distinct God-given status, and feared, with some reason, that sworn peace associations would become popular conspiracies subverting the natural order and pitting communities and classes against one another. Nevertheless, Gerard had to accept the demands of the people of Cambrai for a sworn peace, complete with the parading of relics and giving of hostages, as an answer to the problem of the castellan, Walter of Lens, and his unruly knights. The strength of the movement did not lie in

<sup>9</sup> Pfister, *Règne de Robert le Pieux*, pp. lx–lxi, 165 ff.; *The Peace of God*, ed. Head and Landes, pp. 332–4; Hoffmann, *Gottesfriede*, 48–9; E. I. Strubbe, 'La Paix de Dieu dans le Nord de la France', *La Paix*, i. 493–6.

<sup>10</sup> *Letters and Poems of Fulbert of Chartres*, 102–3, 262–3.

some metaphysical idea of universal peace, but in its adaptation to society as it was actually developing: in the way the peace-oath reinforced the solidarity of urban communities and the mutual fidelity of vassals and lords, both lay and ecclesiastical. (The oaths sometimes included the clause 'that a man will not betray his lord'.)<sup>11</sup>

A century later, the king of France would be on the way to absorbing these lesser peaces into his own, but for the moment the effective enforcement of the oath was by local associations with potentialities for conflict as much as for order. The urban communes which would come to challenge feudal authority owed their origins to the swearing of peace in times of crisis such as occurred at Corbie in northern France around the year 1030. The 'first book of the miracles of Saint Adalhard, abbot of Corbie' records that, when fire devastated the church, it was agreed that the intercession of the saints was needed to appease the anger of the Supreme Judge. People from each area brought holy relics, and when they were assembled an unbreakable pact of peace was made, in which the men of Amiens, with their patron saints, also joined. The peace was to be for the whole week (not just a truce on holy days), and the men of Amiens swore to come back annually at the feast of St. Firmin to renew it. If any disagreement arose among them, it was not to be pursued by plundering and arson until the count and the bishop had been given a chance to resolve it at that meeting. So 'a new religion [i.e. rule of life] put forth a customary law', and disputes of all sorts were pacified each year at rogation-tide at the bringing-together of the saints—'until from repeated use, the custom fell into contempt'.<sup>12</sup>

The first urban 'conspiracy which they called a commune' seems to have been that formed at Le Mans in 1069/70. Though not described as a peace, it was sealed by an oath which the townsmen forced upon the reluctant lords of the region, and punitive expeditions, led by the bishop and the parish priests of le Mans with their crosses and banners were mounted against those who opposed the commune's 'holy ordinances'.<sup>13</sup> The word *communia* may have been applied still earlier to a diocesan peace association formed by Archbishop Aimoin of Bourges after a terrifying eclipse of the sun in 1038. The archbishop himself took the

<sup>11</sup> *Gesta episcoporum Cameracensium, Liber III: De Rebus Gestis Gerardi Episcopi*, in MGH Scriptores rerum Germanicarum 7, ed. G. H. Pertz (Hanover, 1846), 474 (27), 480 (37), 481 (41), 482 (46–7), 485 (52), 486–7 (53–4); Pfister, *Règne de Robert le Pieux*, 170–3; G. Duby, *The Three Orders: Feudal Society Imagined*, tr. A. Goldhammer (Chicago UP, 1980), pp. 21–43; Strubbe, 'Le Paix de Dieu dans le Nord de la France', p. 497.

<sup>12</sup> *Ex libro primo miraculorum S. Adalhardi Abbatis Corbeiensis*, in *Recueil des historiens*, x. 378–9.

<sup>13</sup> *Ex Gestis Pontificum Cenomannensium*, in *Recueil des historiens*, xii. 539; A. Vermeesch, *Essai sur les origines et la signification de la commune dans le Nord de la France*, Studies presented to the International Commission for the History of Representative and Parliamentary Institutions, 30 (Heule, 1966), 25–41, 81–8; Hoffmann, *Gottesfriede*, 105–10, 123–5.

peace-oath on the relics of the first martyr, St. Stephen, followed by the other bishops, their priests and people, so that like another Israel they would be able to beat down the proud and bring back the enemies of peace to right ways. But Gerard of Cambrai's fears were justified here: people were set against their landlords, and members of the ruling class against each other. Aimo used for his own ends the popular forces he had harnessed, making the enforcement of the peace an excuse to raise a tax and to turn fire and sword, without mercy to women and children, upon a castle and township held against him. Inevitably, both at Bourges and Le Mans the footsoldiers of the communes were eventually cut to pieces by the lords they had sought to tame.<sup>14</sup>

In the middle years of the eleventh century there was spreading through France a new form of peace pact 'called, in the vulgar tongue, the Truce of God'. It originated in 1027 at the council of Toulouges on the Spanish march, where the bishops of the region, along with the clergy and faithful people, reasserted the usual peace ordinances and the prohibition of marriage within six degrees of relationship, but also decreed that no one in that county or bishopric should attack his enemy between the ninth hour on a Saturday and the first hour on a Monday. Other councils soon extended the truce to begin on Wednesday evening, for (as Glaber explained) 'while Sunday is a holy day in recollection of the Resurrection of Our Lord', other days 'should be freed from wrong actions out of respect for the Supper and Passion of Our Lord'. When Lent, the period covering the Rogation Days and Pentecost and other feasts were added to the truce, private war was forbidden on a hundred days or so of the year.<sup>15</sup>

The 'truce of God' proscribing violent injuries of every kind for lengthy intervals of time was added to the peace which gave continuous protection to clergy, travellers, and the poor, to form the larger ideal of 'the peace of God': none should think they could instantly revert to pillage when the *treuga Dei* ended. Archbishop Raimbald of Arles and Abbot Odilo of Cluny presented the larger ideal to the bishops and clergy of Italy in a letter written between 1037 and 1042 in the name of the clergy of France. The truce of God was sent from heaven, they said, to allow people to go about their business, at least for four days and nights in the week, secure from fear of their enemies. Anyone who killed during the truce must suffer a long exile and go on pilgrimage to Jerusalem, while those who broke the peace in some other way should

<sup>14</sup> *Les Miracles de St. Benoît*, ed. E. de Certain (Paris, 1858); Hoffmann, *Gottesfriede*, 105–10; T. Head, 'The Judgment of God: Andrew of Fleury's Account of the Peace League of Bourges', in *The Peace of God*, 219–38.

<sup>15</sup> Glaber, *Histories*, 236–9; Mansi, *Concilia*, xix. 483–4; *Constitutiones et Acta Publica Imperatorum et Regum*: 911–1197, MGH Legum Sectio 4, i (Hanover 1893), 596 ff.; Hoffmann, *Gottesfriede*, 74–6; Bonnaud-Delamare, 'La Paix en Aquitaine', 458.

be examined and punished according to secular law, and also sentenced to double the penance prescribed by the sacred canons.<sup>16</sup>

The Council of Narbonne in 1054, after declaring 'that no Christian should slay a fellow-Christian, for he who kills a Christian without doubt sheds the blood of Christ', set out the terms of a model truce. Perpetual exile was prescribed not only for those who killed but also for those who took their enemies prisoner or attacked their castles within the truce. Anyone accused of lesser harm should be tried before his bishop, or before other clergy at the bishop's delegation, by the ordeal of cold water, for the new laws of the *treuga Dei* also covered destroyers of the olive trees from which holy chrism was made, and those who harmed sheep and shepherds, every day and everywhere; even obdurate debtors came under them to the extent that they were to be excluded from the ministrations of their parish priests until they repaid their debts.<sup>17</sup>

As what a later writer called a 'perpetual truce', distinct from the original *treuga temporalis*, the peace became a standard part of episcopal legislation throughout France and spread into Catalonia, Germany, and Southern Italy. The peace-oath proved useful to the papal reform movement in its fight against simony (advancement in the church by the use of money or social influence), clerical marriage, and other forms of pollution.<sup>18</sup> In 1095, after years of conflict over the investiture of prelates by lay princes, Pope Urban II came into France and held a great council at Clermont. Fulcher of Chartres reports that in his sermon Urban singled out 'simoniacal heresy' for attack and then turned to denounce 'thieves and burners of houses' and those who 'seized bishops, monks, priests, nuns and their servants, or pilgrims or traders, to despoil them'. He had heard that, perhaps due to the bishops' own weakness in administering justice, scarcely anyone in France dared 'to travel on the road with hope of safety for fear of seizure by robbers by day or thieves by night . . . Wherefore the truce commonly so-called, which was long ago established by the holy fathers, should be renewed.' The varying lists of canons which survive from Clermont show that the familiar run of reforming decrees was indeed prefaced by a peace statute, and that the act for which the council is most famous, the launching of the First Crusade, was an interruption of its normal business. The lasting but incidental result of the council was in fact to bind the hopes of success in war against Islam to peace in Europe: a special three-year truce was declared to protect those

<sup>16</sup> *Constitutiones*, 911-1197, 596-7, 605 (12); Hoffmann, *Gottesfriede*, 82.

<sup>17</sup> Mansi, *Concilia*, xix. 827-32.

<sup>18</sup> *Constitutiones*, 911-1197, 602-16; Hoffmann, *Gottesfriede*, 70-89, 223, 236; A. G. Remensnyder, 'Pollution, Purity, and Peace', in *The Peace of God*, 280-307.

heading for Jerusalem and the property and dependents they left behind, and universal peace among Christian princes proclaimed to allow them to unite against the enemy.<sup>19</sup>

Bishops routinely promulgated the *treuga Dei* in their dioceses on the authority of the Council of Clermont, and it was reaffirmed by the Lateran councils which popes summoned in 1123, 1139, and 1179, but the canon law of the whole church was never much concerned with the truce. The great canonist, Bishop Ivo of Chartres, wrote in 1101 in reply to a question from Archbishop Daimbert of Sens that the truce of God was made for the common utility by an assembly of a locality (*placito et pacto civitatis ac patriae*), and even a murderer could not be condemned under the terms of a peace he had not sworn to. The peace of God was important in the long term for its development of ideas of injuries committed 'against the common utility' and procedures for the trial and punishment of peace-breakers which would be drawn upon by the authorities of secular states.<sup>20</sup>

The first object of the truce was to criminalize feudal violence and rapine. Sieges must be inactive during the truce unless the defenders tried to break out.<sup>21</sup> The scales of punishment prescribed for peace-breakers began to classify crimes according to their gravity. Churchmen graduated the length and severity of the penances they prescribed, differentiated between exile within the diocese and outside it, and sent those guilty of the 'horrible malice' of arson to Jerusalem or to fight against the moors in Spain.<sup>22</sup> It was declared not to be a breach of the peace to order the caning of a delinquent servant or pupil. At the other extreme some peace agreements imposed death or the amputation of limbs for homicide, wounding, the rape of virgins, and major thefts, and it was at this period that blood punishments came to replace monetary payments as the resolution of feuds. Those who received criminals or fugitive serfs made themselves liable to the same penalties as the people they sheltered, and those guilty of verbal abuse incurred beatings.<sup>23</sup>

But Ivo of Chartres insisted (on the authority of St. Augustine) that peace-breakers should not be punished until they had been properly tried and convicted, nor excommunicated unless they refused to make

<sup>19</sup> *Fulcheri Carnotensis Historia Hierosolymitana*, ed. H. Hagenmeyer (Heidelberg, 1913), pp. 61–9; Mansi, *Concilia*, xx. 815–919, esp. pp. 902–3 (c. 8).

<sup>20</sup> Orderic Vitalis, *The Ecclesiastical History*, ed. and tr. M. Chibnall, 6 vols. (Oxford: Clarendon Press, 1969–80), v. 12, 20, vi.262; Ivo's letter no. 90 in J.-P. Migne, *Patrologia Latina*, clxii (Paris, 1889), cols. 111–12; nos. 44 and 62 in Yves de Chartres, *Correspondance*, ed. and tr. J. Lerclercq, i (Paris, 1949), 175–85, 259; Hoffmann, *Gottesfriede*, 226–8, 231–43.

<sup>21</sup> *Constitutiones*, 911–1197, 604 (5).

<sup>22</sup> Glaber, *Histoires*, 238–9; Bloch, *Feudal Society*, 365; c. 18 of the Second Lateran Council of 1139, in *Conciliorum Oecumenicorum Decreta*, 2nd edn. (Freiburg in Breisgau, 1962).

<sup>23</sup> *Constitutiones*, 911–1197, 604 (9), 608 ff.

amends.<sup>24</sup> In the place of bishop and count the prior of Cluny tried crimes against the peace within the great abbey's lands, convening a special court of six or seven experienced monks and the same number of lay vassals.<sup>25</sup> And in the Gevaudan, the bishop and a lay lord chose twelve justices 'to judge the disputes of all those coming into the peace'.<sup>26</sup> *Paziers* emerged in other parts of France. At Montpellier they were to assemble every year at the beginning of May to hear complaints, make decisions about the law, and ask the bishop to excommunicate the guilty. To support the work, a tax known as the *compensum pacis*, which disappeared only in 1789, was assessed on heads of houses and their cattle: in the case of the Gevaudan it was collected at the cathedral in Mende, in a chest to which the bishop and certain lay lords held separate keys.<sup>27</sup> At the end of the century Bishop Ivo of Chartres told Count Stephen of Blois 'for the third time' that he must submit the differences between them to the judges who had sworn to make just judgments concerning the peace.<sup>28</sup> Swearing one's innocence while grasping a reliquary was a normal method of trial, for the saint would take vengeance on the perjurer.<sup>29</sup> The 'judgment of God' (*judicium Dei*) had been invoked by means of an ordeal long before the eleventh century, but ordeals spread more widely as a means of trying unfree peace-breakers. The guilt of accused persons was registered by the festering of their burns after they had carried hot iron for a number of paces or by their rejection by the water into which they were lowered at the ends of ropes.<sup>30</sup>

For enforcement the peace of God depended ultimately on the co-operation of the lay princes and their vassals. The peace movement can be seen as both an expression of millennial enthusiasm embracing whole communities of clergy, lay lords, and common people, and as the last stand of the Carolingian polity, in which count and bishop exercised coordinate jurisdiction in the face of the rising power of the feudal lords.<sup>31</sup> According to Ralph Glaber, writing about 1041, it took a

<sup>24</sup> *Patrologia Latina*, clxii, col. 107, 277–8; *The Ecclesiastical History of Orderic Vitalis*, vi. 259.

<sup>25</sup> G. Duby, 'Recherches sur l'évolution des institutions judiciaires pendant le x<sup>e</sup> et xi<sup>e</sup> siècles dans le sud de la Bourgogne', *Moyen Âge*, 52, 53 (1946–7), 172ff.

<sup>26</sup> C. Brunel, 'Les Juges de la paix en Gevaudan au milieu du xi<sup>e</sup> siècle', *Bibliothèque de l'École des Chartes*, 109 (1951).

<sup>27</sup> A. Joris, 'La Trêve de Dieu à Liège', in *La Paix*, i. 504, 544, for the peace tribunal at Liège; Brunel, 'Les Juges de la paix en Gevauden', 38–9, for the *compensum pacis*.

<sup>28</sup> *Patrologia Latina*, clxii, col. 111.

<sup>29</sup> *Constitutiones*, 911–1197, 601 (10), 608 (5); Mansi, *Concilia*, xix. 600; N. Herrmann-Mascard, *Les Reliques des saintes: Formation coutumière d'un droit* (Paris, 1975), 238 ff.

<sup>30</sup> C. Morris, 'Judicium Dei: The Social and Political Significance of the Ordeal in the Eleventh Century', *Studies in Church History*, 12 (1975), 99 ff.; R. Bartlett, *Trial by Fire and Water: The Medieval Judicial Ordeal* (Oxford: Clarendon Press, 1986), 33, 51–2, 92.

<sup>31</sup> H.-W. Goetz, 'Protection of the Church, Defense of the Law, and Reform: On the

deadly fever to get the lords of Neustria to accept the truce of God at all;<sup>32</sup> and in 1094 Ivo of Chartres refused to bring his military vassals to a *placitum* between King Philip I, King William II of England, and Robert Curthose, duke of Normandy, until those knights who had been excommunicated for breaking the peace had made satisfaction and been reconciled.<sup>33</sup> Bishop Lambert of Arras, Ivo's contemporary, informed the countess of Flanders that he had excommunicated her bailiff at Bapaume for refusing to give back what he had taken 'within the peace' from pilgrims leaving his diocese for Rome: if the countess did not see that restitution was made the bishop would have to make sure that the peace statutes were observed and place under an interdict the castle in which this and many other crimes had been committed.<sup>34</sup>

Yet spiritual sanctions alone had limited power to enforce *pax et justitia*, and ultimately the bishops had to turn for help to the count of Flanders or one of the other great lords who saw the value of the peace of God in building up their principalities. Stories that the count's officers hanged, burnt, or boiled in oil knights who stole cows from peasant-women and merchandise from traders testify to the struggle to establish a 'peace of the count', first of all over the markets and fairs of economically vibrant Flanders. In 1093 Count Robert the Frisian swore to uphold the truce of God, forbade castle-building without his permission, and extended protection more generally to travellers and the vulnerable. Count Robert II claimed in 1111 to follow the example of his predecessors in decreeing, with the assent of his leading men, a 'Flemish peace' (*pacem Flandricam*), the declared purpose of which was to restrain the audacity of the common people by a *lex talionis*: death for those who committed or merely threatened arson (an ever-present terror in a medieval city) and maiming for those who maimed.<sup>35</sup> Charles the Good, who became count in 1119, took measures for 'the reformation of the peace and the reaffirmation of the laws and rights of the realm', and 'little by little a state of peace [*pacis statum*] was restored, and by the fourth year of his reign everything flourished'. Yet as he knelt

Purposes and Character of the Peace of God, 989–1038', in *The Peace of God*, 259–60, 270; R. I. Moore, 'Postscript: The Peace of God and the Social Revolution', *ibid.* 323–5, 342; M. de Bouard, 'Sur les origines de la trêve de Dieu en Normandie', *Annales de Normandie*, 9 (1959), 188–9; Hoffmann, *Gottesfriede*, cap. vii: 'Pax-Milizen'; Vermeesch, *Essai sur les origines et la signification de la commune*, 42–77, for diocesan communes; Duby, 'Recherches sur l'évolution des institutions judiciaires', *Moyen Âge*, 52, 194, and 53, 16, 34–8.

<sup>32</sup> Glaber, *Histoires*, 238–9.

<sup>33</sup> *Patrologia Latina*, clxii, cols. 40–1, 107, 653, 659, 662–3.

<sup>34</sup> Hoffmann, *Gottesfriede*, 150ff.

<sup>35</sup> *Constitutiones*, 911–1197, 599–601, 616–17; Hoffmann, *Gottesfriede*, 143–58; G. G. Koziol, 'Monks, Feuds, and the Making of Peace in Eleventh-Century Flanders', *Historical Reflections*, 14 (1987), 531–49; D. Nicholas, *Medieval Flanders* (London, 1992), 59–62.

at Mass in the church of Bruges on 2 March 1127 Count Charles was murdered by kinsmen of the provost of the town, against whom the leading men had given a judgment in the count's court. The king of France had to intervene to see the murderers of their lord condemned and thrown from the highest battlements of the castle, and a new count installed who was acceptable to himself and to the king of England also, for the 'holy and pious Count Charles' had held fiefs and benefices from the kings of both realms. Secular peace was now in the hands of royal overlords who combined feudal power with the authority of anointed kings.<sup>36</sup>

Normandy provides the best example of a transition from God's peace to a secular lord's peace which was territorial in coverage and not simply the protection of privileged individuals and their property. The Norse counts of Rouen and dukes of Normandy were enthusiastic patrons of monasteries and supporters of ecclesiastical reform, but something of Carolingian administration by *vicomtes* had been preserved in the principality and private war had been kept at bay without the use of ecclesiastical sanctions. This was true at least until the troubles which accompanied the minority of William the Bastard, the future Conqueror of England, who succeeded to the dukedom in 1035. Probably in 1047, after William's victory over rebels from lower Normandy at the battle of Val-ès-Dunes, relics from all over the province and 'an infinite concourse of people' were brought together at Caen, where the duke and his bishops instituted 'the peace vulgarly called the Truce of God' in Normandy. According to 'The Miracles of Saint Ouen', Rouen's patron saint, whose relics were no doubt brought by Duke William's cousin, the abbot of Saint Ouen, a council met for two days to discuss 'the peace of the realm and the state of the commonwealth' (*de pace regni et statu reipublicae*). A peace oath was sworn, 'everyone rejoiced, especially the peasantry', and people went home taking the bodies of the saints with them, Saint Ouen healing a paralysed woman on the way. The sanctions prescribed by the synod at Caen were ecclesiastical ones, but there is no mention of an episcopal court in the various texts of the proceedings. Moreover, the council gave 'the count of the country' the inestimable advantage over his vassals of exemption from the ban on warfare during the truce, for it was the ruler's business to see the peace was kept.<sup>37</sup>

William the Conqueror's assumption in 1066 of the authority and

<sup>36</sup> Galbert of Bruges, *The Murder of Charles the Good, Count of Flanders*, tr. J. B. Ross (New York: Columbia UP, 1960), 42 ff., 83 ff., 105-9, 251, 312.

<sup>37</sup> Mansi, *Concilia*, xix. 597-600; *Miracula S. Audoeni in Acta Sanctorum*, August, vol. 4, p. 834; M. de Bouard, 'Sur les origines de la trêve de Dieu en Normandie', *Annales de Normandie*, 1959, 169-89; D. Bates, *Normandy before 1066* (London, 1982), 66, 163-4, 174, 176, 195.



administrative resources of the Anglo-Saxon monarchy probably accounts for the more masterful tone of the statutes of the council William summoned to Lillebonne at Pentecost 1080. There, 'by the king's foresight and the advice of his barons effective provision was made for the state of the church of God and of the whole realm.' First of all the truce of God was renewed, and this time the bishop was instructed to enforce it: but if his sentence was disobeyed, the offender's lord should compel him to submit to episcopal justice, and if the lord refused to do this 'the king's *vicecomes*, on being requested by the bishop, must act without making excuses'. After 1066 the term *vicecomes* was applied to the English sheriff, and the writ to the sheriff was adopted as the most potent instrument of Anglo-Norman administration. In the earliest English register of writs, compiled around 1227, there is a mandate to the sheriff to arrest a person reported to the king by a bishop for refusal to submit to ecclesiastical censure. May not William in 1080 have been extending to the rest of his realm a device of English royal government?<sup>38</sup>

#### THE PEACE OF THE LAND

The truce of God was never formally promulgated in England, perhaps because private war did not become an overwhelming threat. But the earlier type of communal peace movement is discernible in London, the only town in England capable of supporting it—in fact some time before the French examples. Between 930 and 940 'the bishops and reeves who belong to London' agreed to an ordinance for the running of their 'peace-gild' (*friðgegyldum*), and the nobles and ceorls confirmed it by giving pledges. A thief over twelve years of age who stole more than 12*d.* in value was to be killed and his goods confiscated; and everybody was to be 'of one friendship and one enmity' in pursuing thieves under the leadership of tithing-men and hundredmen and in contributing to funds to support the gild's activities. This is a detailed set of regulations for catching and punishing thieves in an area centred on the city but which the reference to 'bishops' in the plural suggests was wider than the diocese of London itself. And one fact made it different from French peace-keeping communes: it was a local application of a general law made by King Athelstan, 'first at Grately and again at Exeter', for the peace of all the folk in every shire. When the execution of men as young

<sup>38</sup> Mansi, *Concilia*, xix. 597–8; de Bouard, 'Sur les origines', 187; *The Ecclesiastical History of Orderic Vitalis*, iii. 24–35; *Early Registers of Writs*, ed. E. de Haas and G. D. G. Hall, Selden Soc. 87 (London, 1970), 15 (48); for a discussion of the nature of the Anglo-Norman realm or 'state' see C. W. Hollister in *Speculum*, 51 (1976), J. Campbell in *Francia*, 9 (1980), and D. Bates in two articles in *EHR* 100 (1985) and 104 (1989).

as twelve for stealing as little as 12*d.* was later rejected as 'too cruel' and the age raised to fifteen, Athelstan trusted that 'our peace is better than it was before.'<sup>39</sup>

As the Wessex dynasty brought the Danes under control, peace agreements with the invaders had become legislation for the internal peace of the community. Alfred's and Guthrum's Peace (886 x 890) drew the boundaries between Wessex and the Danelaw, set the wergilds of Englishmen and Danes at the same amount, and provided that thegns on both sides should clear themselves of accusations of crime by the oaths of themselves and twelve of their equals. King Edward the Elder extended these provisions, commenting that his father and Guthrum had 'made ordinances of secular justice according to their understanding, because otherwise they could not exercise discipline over many people or bring them to worship God as they should'. The peace that Alfred and Guthrum had declared inviolable was still contained within the walls of churches or specifically granted by the ruler, but in tenth-century England the *cyninges handgrið* (the king's 'hand-given peace') started to grow into a *landfrieðe* (a peace over the whole land). From Edward onwards, kings repeatedly urged their nobles and reeves to see 'the peace of us all' better kept. King Aethelred urged people to be zealous about the improvement of peace and of the coinage, the repair of boroughs in every province, and the performance of military service whenever the king required it. King Cnut, in a letter of 1019–20 to the people of England, acknowledged the pope's injunction that he should 'everywhere exalt God's praise, and suppress injustice, and *full frið wyrcean*', and in his laws he declared that he would not allow 'overbearing men' to defend their retainers in any way they thought fit, and required everyone to swear at the age of twelve to refrain from stealing.<sup>40</sup>

To begin with, however, the two conquests of England in the eleventh century, Cnut's from Denmark and William's from Normandy in 1066, seem to have created conditions which fragmented peace again into the protections given by kings and nobles to particular places and individual servants. This is the message of the unofficial compilations of English laws made in the twelfth century. The long popular 'Laws of Edward the Confessor' (the one late Anglo-Saxon king not known to have made any laws), which claim to have been confirmed by William in the fourth year of his reign after consultation with juries from every shire, start with what seems to be a version of the truce of God; entitled in one text 'the times and days of the king's peace', this was to be

<sup>39</sup> Liebermann, *Gesetze der Angelsachsen*, i. 173–83; tr. by Whitelock in *EHD* i. 387–91; P. Wormald, *The Making of English Law: King Alfred to the Twelfth Century*, i. *Legislation and its Limits* (Oxford: Blackwell, 1999), 296–9, 306.

<sup>40</sup> Liebermann, *Gesetze der Angelsachsen*, i. 126–9, 140–1, 166–7, 188–9, 208–11, 212–13, 224–5, 228–9, 242–3, 254–5, 273, 322–3; translations by Whitelock in *EHD* i. 380–430.

observed throughout the realm explicitly for the benefit of the clergy. But the peace of the king was seen to be of many sorts (*multiplex*): it was given by the king's hand, covered especially the octaves of the king's crowning and of the feasts of Christmas, Easter, and Pentecost, and protected the four great roads of Watling Street, Fosse Way, Icknield Street, and Ermine Street, and the waterways by which food was brought to the towns. A clause in the compilation called *Quadripartitus* gave the exact dimensions of the peace (*grið*) which surrounded the king's court: three miles, three furlongs, three acres-breadths, nine feet, and nine barleycorns in each direction from the door of the king's dwelling. Behind all these special peaces, there was also the 'great peace' (*pax maxima*) of the frankpledge system, which maintained everyone 'in a secure state' (*firmiori statu*) under the surety of his tithing.<sup>41</sup>

The summary given by the compilation so-called 'Laws of Henry I' (c.1115) of the jurisdictional rights which 'a proper ordering of peace and security reserves to the king of England in his land and over all men' put first 'breach of the king's peace given by his hand or writ', followed by the tax known as Danegeld, contempt of the king's writs and commands generally, and 'the death or injury of his servants wherever occurring'. Breach of the peace which the king gave personally was the most heinous and incurred loss of limbs, but the king's peace might also be conferred by a sheriff or other royal official. By 'public announcement' God's peace and the king's peace could be established over a drinking assembly 'set up for the making of any gift or purchase or gild meeting or anything of this kind', and in these circumstances a fine for breach of the peace was to go to the master of the house. Recorded lawsuits of the time suggest that the most important manifestation of the king's peace in England was coming to be intervention by royal writ to enforce the peaceable settlement of disputes. There is an early example in William Rufus's own great case against William de Saint-Calais, bishop of Durham, accused of conspiracy in a feudal revolt of 1088. The bishop is described as appealing unsuccessfully to the king for the return of the lands which the sheriffs had been ordered to seize from him, for he had always offered justice. 'However, it did not please you to restore to me what was mine, as I requested and as it seemed just to me, but you granted me your peace by your writ to come safely to you . . . and in the same writ you ordered your lieges throughout England to leave all my things in peace until you knew whether I would stay with you.'<sup>42</sup>

<sup>41</sup> Liebermann, *Gesetze der Angelsachsen*, i. 487, 490, 627-8, 637-8, 645, 651, 661; see also B. R. O'Brien, *God's Peace and King's Peace: The Laws of Edward the Confessor* (Philadelphia: U. of Pennsylvania P., 1999).

<sup>42</sup> *Leges Henrici Primi*, tr. Downer, 70-1, 109 (10. 1), 246 (79.3, 4), 252-5 (81); *English Lawsuits from William I to Richard I*, ed R. C. van Caenegem, Selden Soc. 106-7 (London, 1990-1), i. 92, and cf. 180, 199, 224, 234, 260, 264, 299.

But it was in Germany that *Landfrieden*, detailed codes of peace-regulations applied to whole regions of the country, became a lasting instrument of royal government in the ordering of the state. Communal peace-agreements appeared among the west Franks as a non-Carolingian dynasty was struggling to establish itself under Hugh Capet, chosen king in 987.<sup>43</sup> Among the East Franks a Saxon dynasty had replaced the Carolingians seventy years earlier, and in 962, after his defeat of the Magyar invaders, Otto I had assumed the title of emperor, and with it a more commanding sense of responsibility for a single Christian commonwealth. A generation before Bishop Gerard of Cambrai resisted the communal peace in the name of imperial authority, the ideal of a stable and peaceful society under the crown was expressed by Gerbert of Aurillac, a great scholar-politician who came to Otto I's notice when he was in the service of the archbishop of Rheims.

For Gerbert the highest of the arts was rhetoric, the art of persuasion, and in Sir Richard Southern's words 'a healing art, an art of government'.<sup>44</sup> In 984 Gerbert wrote in agitation to Abbot Gerald of Aurillac that the premature death of Otto II had destroyed 'the state of God's churches . . . the commonwealth has perished'. 'The state and peace of the churches and kingdoms' is a constant theme of his letters to archbishops and princes and also of the letters between other great men of France and Germany which are preserved with his own. For Gerbert, peace and concord between kings and princes was identical with the peace of the catholic church. He had a large part in getting Hugh Capet made king of France. Under King Hugh's patronage, Gerbert obtained the archbishopric of Rheims; under the Emperor Otto III's, he moved to be archbishop of Ravenna, and was almost immediately made pope, taking the name of Sylvester II after the predecessor who had served Constantine the Great. An imperial grant of eight Italian counties to the papacy 'for the love of our teacher Lord Pope Sylvester' acknowledged Rome as head of the world, not on account of a mythical donation of power by Constantine to popes (who had often been negligent and stupid), but because it was the seat of Otto's empire.<sup>45</sup>

More abstract political concepts tended to emerge at the level of empire or kingdom, but the peace which was important to the emperor's subjects was still the protection granted in answer to the petitions of

<sup>43</sup> Richer, *Histoire de France*, 2 vols., ed. and tr. R. Latouche (Paris, 1930-7), ii. 162.

<sup>44</sup> R. W. Southern, *The Making of the Middle Ages* (London, 1953), 176.

<sup>45</sup> *Die Briefsammlung Gerberts von Rheims*, ed. F. Weigle, MGH Briefe der Deutschen Kaiserzeit 2 (Berlin, 1966), 38, 62, 63, 66, 101, 109, 136, 143, 165, 171; Richer, *Histoire*, ii. 314-25; *Ottonis II et Ottonis III Diplomata*, ed. T. Sickel, MGH Diplomata Regum et Imperatorum Germaniae [RIG] 2 (Hanover 1888-1893), 818-20; English tr. in Boyd H. Hill Jr., *Medieval Monarchy in Action: The German Empire from Henry I to Henry IV* (London, 1972), 177-9.

local churches and communities. The emperor's powers and responsibilities were proclaimed in the *arengae* ('harangues') at the beginning of charters, which could be 'expounded in church like sermons' in the beneficiaries' home districts.<sup>46</sup> The Saxon and Salian emperors thus made grants or confirmed their predecessors' grants to churches, and occasionally lay vassals, expressing the conviction that it would advance the 'stability' and 'peace' of the empire, or the 'state', 'prosperity', or 'quiet' of kingdom and church, and also bring spiritual rewards to the emperor and his family 'in the state of this present life' and the state 'of future glory'.<sup>47</sup> Prayers might be asked for the *status regni*, the salvation of the souls of the king and his family, and 'the peace and concord of the whole world', in return for a grant of immunity, or *bannus* in a market or forest, or *friede* or *pax* which could be protection for traders going to a market, or the beneficiary's right to exact the *fredus* penalty when the market-peace was broken.<sup>48</sup> An abbeß was given a market with 'every public function except minting, and with the stability of every right' (*cum totius stabilitate iuris*), so that there would not be a more stable market granted by kings or emperors in all Alsace; and whoever came to this 'public market' was assured of the king's ban and protection for a mile around.<sup>49</sup> Many cathedral churches and abbeys

<sup>46</sup> H. Fichtenau, *Arenga* (Graz and Cologne, 1957); K. J. Leyser, *Rule and Conflict in an Early Medieval Society: Ottonian Saxony* (London, 1979), 103; *Arengenverzeichnis zu den Königs- und Kaiserurkunden von den Merowingern bis Heinrich VI*, compiled by F. Hausmann and A. Gawlik (MGH Hilfsmittel 9, Munich 1987).

<sup>47</sup> Examples in: *Conradi I, Heinrici I et Ottonis I Diplomata*, ed. T. Sickel, MGH Diplomata RIG 1 (Hanover, 1879–84), 316.5, 490.19, 580.26; *Ottonis II et Ottonis III Diplomata*, 49.15, 55.27, 58.3, 104.15; *Heinrici II et Arduini Diplomata*, ed. H. Bresslau, MGH Diplomata RIG 3 (Hanover, 1900–3), 1.16, 42.33, 78–80, 98–9, 112 (no. 89), 274 (no. 237), 308, 320–1, 408–9, 449–51, 551–2; *Conradi II Diplomata*, ed. H. Bresslau, MGH Diplomatum RIG 4 (Hanover, 1909), 206, 269–71; *Heinrici III Diplomata*, ed. H. Bresslau and P. Kehr, MGH Diplomatum RIG 5 (Berlin, 1931), 10.21, 30.22, 34.16, 36, 38, 53–4, 451.24; *Heinrici IV Diplomata*, ed. D. von Gladiss and A. Gawlik, MGH Diplomata RIG 6 (Berlin–Hanover, 1941–78), 14.13 ('regni nostri stabilitatem'), 35.40, 124.17 ('ad quietum temporalis regni statum et perpetue beatitudinis augmentum tam nobis quam parentibus nobis'), 221.12 ('statum rei publice'), 538.19, 633.36; *Conradi III et filii eius Heinrici Diplomata*, ed. F. Hausmann, MGH Diplomata RIG 9 (Vienna, Cologne, and Graz, 1969), 50.2, 59.14, 151.23, 213.20, 250.26, 348.10; *Friderici I Diplomata, 1158–1167*, ed. H. Appelt, MGH Diplomata RIG 10, part ii (Hanover, 1979), 263.15, 28 ('perpetuali libertate sit stabilitus et confirmatus'), 285.11.

<sup>48</sup> *Conradi I . . . et Ottonis I Diplomata*, 157; *Ottonis II [etc.] Diplomata*, 55.3; *Heinrici II et Arduini Diplomata*, 309.22; *Conradi II Diplomata*, 70.36 ('pro totius mundi pacis et concordie . . . deprecetur'), 271.13; *Heinrici IV Diplomata*, 2.41, 33.37, 247.30 ('pro genitore nostro et pro nobis et pro coniuge nostra et stabilitate totius imperii nostri . . . exorare'); *Conradi III Diplomata*, 59.31, 459.32 ('pro salute nostra et pro statu imperii nostri assidue deum orent et pro remedio anime nostre apud ipsum orationibus interveniant'); *Friderici I Diplomata, 1158–1167*, 263.35.

<sup>49</sup> *Heinrici II et Arduini Diplomata*, 15.30, 60.5, 98.40 ('mercatum sive emprium . . . cum theloneo sive vectigali regioque banno et omni publica functione, excepta moneta') etc.; cf. *Conradi I . . . et Ottonis I Diplomata*, 583–4, where minting is included in the grant; for other grants of *bannum mercati*: and *bannum villae*: *Heinrici IV Diplomata*, 92.21, 536.8.

gained forest rights with the same power to enforce the imperial *bannus* and *pax* ('wildban') in their forests that other churches had from the emperor's predecessors, every grant ending with the injunction that it should remain *stabilis et inconvulsa*.<sup>50</sup>

As in France, so in Germany, the eleventh century saw the ideal of peace achieving greater importance, but in this case it was the emperor's peace rather than God's. On the death in 1004 of Hermann duke of Swabia, leaving a son too young to govern, Henry II (1002–24), the last of the Saxon kings, is reported to have called a council in the duchy and made everyone, from the least to the greatest, swear an oath to keep the peace and refrain from stealing. Then, with all Germany 'set [*statuta*] under the quiet of peace', Henry moved on to Alsace 'to make law and do justice'. Much of the justice consisted of the settlement of disputes between churches and the restoration of the 'state' of particular bishops and convents.<sup>51</sup> Conrad II (1024–39), the first of a new Salian dynasty, in a grant to the cathedral church of Bamberg, roundly asserted the imperial right to regulate 'the affairs of the whole realm and the state of the empire, and above all the welfare of god's holy churches' lest they fall away from the ancient purity of religion. He settled disputes between bishops out of his imperial duty to 'spread peace and concord and augment religion throughout his realm' and always 'to consult the interests of the commonwealth and everyone within it' (*publice rei et communi hominum utilitati in omnibus et per omnia consulendum*).<sup>52</sup>

Since the reign of Otto I the German 'kings of the Franks and the Lombards' had periodically gone across the Alps to stabilize the affairs of Italy 'with law and justice'. When the knights of Milan threatened to 'make a law by themselves, for themselves' if Conrad did not come to settle their grievances against the archbishop, the emperor reputedly answered that he would sate Italy with laws if the country hungered for them, and issued the diploma known as the *constitutio de feudis*, the ordinance which stands at the beginning of the *Libri feudorum* added by medieval jurists to Justinian's *Corpus of Civil Law*. No vassal of a bishop, abbot, abbess, margrave, or count, or holding from the royal estate or from the Church, should be deprived of his benefice unless he was convicted of a fault by his peers in accordance with imperial constitutions. Vassals' fiefs were declared, in the absence of fault, to be

<sup>50</sup> *Heinrici II et Arduini Diplomata*, 1.20, 35 (Worms), 291.39 (Fulda), 412, 34 (Würzburg), 449.10 (Hersfeld) etc.; *Conradi II Diplomata*, 150–1, 201–2, 231–2; *Heinrici IV Diplomata*, 25, 204, 250, 282.10 ('bannum unum quod vulgo wildban dicitur').

<sup>51</sup> J. Gernhuber, *Die Landfriedensbewegung in Deutschland bis zum Mainzer Reichslandfrieden von 1235* (Bonn, 1952), 28–33; *Heinrici II et Arduini Diplomata*, 208.23, 267.30 ('in pristinam libertatem stabilitatemque restituat'), 549.12, 656.8.

<sup>52</sup> *Conradi II Diplomata*, 149, 206, 240, 263; Wipo, 'The Deeds of Conrad II', in *Imperial Lives and Letters of the Eleventh Century*, tr. T. E. Mommsen and K. F. Morrison (New York: Columbia UP, 1962), 72.

hereditary: a decision which contributed to the formation of the free-holding class which was the backbone of the Italian communes.<sup>53</sup>

Confirming the rights of a Piedmontese monastery in 1039, the year of his election, Conrad's son Henry III located kingly honour in the energetic justice which protected 'the state of the catholic church'. An emperor like Henry who was prepared to make and unmake popes did not hesitate to use the church to safeguard the peace of the empire. The arenga of a charter of 1040 proclaimed his belief that 'the state of the whole realm and public and private affairs would be more stable' if he protected the goods of the church; and a spurious charter written about 1116 pictures him *de nostri statu regni tractantes* before deciding in 1043 to marry Agnes of Poitou. In 1047, as he sat in his imperial palace at Ravenna consulting with his judges and 'dispensing justice to all in the accustomed way', he emphasized the imperial duty to scrutinize 'justice and the state of the laws'. In 1049, along with Pope Leo IX, his own appointment and the real initiator of papal reform, he presided over a synod at Mainz to issue decrees condemning simony and clerical marriage and confirm and extend on his own authority 'the holy canons' and 'sacred laws of our predecessors' on the marriages of the laity. He also legislated at this time against poisoning and other forms of clandestine killing, since it was part of the emperor's skill to 'take care of the commonwealth in the present in ways that would be useful to later generations'.<sup>54</sup>

The direction of Christian society by kings in amicable concert with churchmen, as it had been established by the Carolingians, ended with Henry III. It was accepted that Henry should legislate on the marriages of his subjects despite his own uncanonical marriage (he and Agnes were related within the prohibited degrees), and that he should both campaign against simony and imperiously appoint and remove prelates. But the intervention of an emperor in Rome itself to depose unsatisfactory popes (as Henry III did) was identified by Geroh of Reichersberg, investigating the machinations of Antichrist in the mid-twelfth century, as the time when *regnum* and *sacerdotium* began to break apart and the political conflicts which led in his own day to the disasters of the Second Crusade had their origin. 'Where are the two swords if all power is the pope's or all Caesar's?'<sup>55</sup> The struggle over the investiture

<sup>53</sup> *Conradi I, Heinrich I et Ottonis I Diplomata*, 316; Wipo, 'Deeds of Conrad II', 92-6; *Constitutiones*, 911-1197, 64; *Conradi II Diplomata*, 335-7; Hill, *Medieval Monarchy in Action*, 73, 77-80, 205-7; *Handbuch der Quellen und Literatur der neueren europäischen Privatrechtsgeschichte*, i. *Mittelalter*, ed. H. Coing (Munich, 1973), 166-7.

<sup>54</sup> *Heinrici III Diplomata*, 18, 71, 239-42, 351, 397-400, 538, 542; *Annales Sangallenses Maiores*, ed. G. H. Pertz in MGH *Scriptores in Folio* 1 (Hanover, 1826), 84-5; Hill, *Medieval Monarchy in Action*, 85-94, 211-14.

<sup>55</sup> Geroh of Reichersberg, *De investigatione Antichristi*, ed. E. Sackur in MGH *Libelli de lite imperatorum et pontificum*, 3 vols. (Hanover, 1891-97), iii. 372, 374, 388-92.

of prelates by princes which boiled up in the reign of the Emperor Henry IV (1056–1106) began to transform the relationship of the spiritual and temporal powers into an unstable demarcation of the rights of the *status ecclesiae* and the *status regni*. The tracts poured out by both the supporters of Henry and those of Pope Gregory VII fuelled the first great ideological conflict in European history. Gregory and his supporters claimed the right of popes to judge kings and depose them when they ruled unjustly—when like bad swineherds they killed the pigs they were hired to tend. The imperialists for their part lamented ‘the confusion of all human laws’, proclaimed it ‘a great heresy to resist God’s order who alone has power to grant empire’, and feared the destruction of the commonwealth which, following Cicero and Saint Augustine, was to be defined as the multitude ‘not gathered together in any fashion but under a common law’.<sup>56</sup>

In 1050–2 Geoffrey Martel, count of Anjou and the Empress Agnes’s step-father, stood up to an angry Pope Leo IX in defence of his imprisonment of Bishop Gervase of Le Mans: the bishop was disloyal and a threat not only to the count’s position (*statum rerum suarum*) but also to the ‘public peace and quiet’ (a phrase which is used three times in one letter), for God had given Geoffrey authority in ‘secular matters’ and made him judge over those who did evil.<sup>57</sup> In Germany the first reaction to the Gregorian turmoil was rather for bishops to belatedly promulgate the truce of God in their dioceses. In 1082, while the emperor was still in Italy attempting to end the ‘unhappy state’ of things at the highest political level, Bishop Henry of Liège enacted the truce in his diocese, knowing that ‘where there is no governor, the people perish’; all proved violators of ‘this law and pact’ were to be excommunicated, and a convicted freeman would incur the loss of his inheritance and exile from the diocese, a serf or cleric ‘the loss of all that he has and his right hand’.<sup>58</sup> The following year Archbishop Siwinus imposed the truce in the diocese of Cologne because of the decay of ‘tranquillity and peace’ and the ‘troubles and dangers’ afflicting the church.<sup>59</sup> In 1084, Henry IV returned from Italy to take charge: a council of the bishops and nobility was summoned to Mainz and the peace of God was established ‘by common consent’ throughout the kingdom. This seems to have meant that the truce was promulgated in each diocese, but the

<sup>56</sup> Karl Leyser, ‘The Polemics of the Papal Revolution’, in *Trends in Medieval Political Thought*, ed. B. Smalley (Oxford, 1965), 42–64 [repr. in Leyser, *Medieval Germany and its Neighbours* (London, 1982)]; *Petri Crassi Defensio Heinrici IV regis*, ed. L. de Heinemann, in *MGH Libelli de lite imperatorum et pontificum*, i. 443.

<sup>57</sup> *Briefsammlungen der Zeit Heinrichs IV*, ed. C. Erdmann und N. Fickermann, MGH Die Briefe der Deutschen Kaiserzeit 5 (Weimar, 1950), 141–3, 146.

<sup>58</sup> *Constitutiones 911–1197*, 603.45; Joris, in *La Paix*, i. 505, 521 ff.

<sup>59</sup> *Constitutiones 911–1197*, 602–5.



peace decreed in 1084 for turbulent Saxony and the provincial peaces arranged in 1093–4 in Swabia, Bavaria, and Alsace, and in Swabia again in 1104, took the form of oaths by the dukes, counts, and nobility to observe the peace of the clergy throughout the year as well as the truce of God at its proper seasons.<sup>60</sup>

The first *Landfriede* for the whole kingdom was promulgated by Henry IV and the bishops together at Mainz in 1103, and supported by the oaths of the king's son and the high nobility. Until the following Pentecost and for four years thereafter peace would cover the churches and clergy and no violence was to be done to merchants, women, and the Jews, nor to one's enemies in their homes (though they could be harmed in the street). For the theft of even five shillings a penalty of the loss of eyes or a hand was prescribed. This 'shield for the king's friends and hindrance to his opponents' was essentially an amalgam of the truce promulgated by a bishop and the peace sworn by the community, and on both counts it retained its provincial character even as it became a main instrument of royal government.<sup>61</sup> *Reichslandfrieden* were again proclaimed in 1119, 1121, and 1125 by Henry V (1106–1125) as part of the 'firm and stable peace' which he made with the papacy over investitures.<sup>62</sup> At this emperor's funeral a group of prelates and princes conferred *de statu et pace regni* and called the royal court together at Mainz to ordain concerning 'the state and succession of the kingdom'; the bishops were to proclaim a special peace to last while the court was meeting and for four weeks longer so that its members could assemble and disperse in safety. The princes then elected the duke of Saxony as Lothar III, who is found sitting at Roncaglia in Italy in 1136 'ordering the justice and peace of the realm according to the custom of emperors of old'.<sup>63</sup> His successor Conrad III (1138–52) was at Utrecht in 1145 taking thought 'for the peace and state of the realm' and confirming the bishop and clergy of the city in the possession of the counties of Ostergau and Westergau.<sup>64</sup> In 1147, before embarking on the Second Crusade, he ordained a firm peace throughout all the parts of his realm, and urged Pope Eugenius, since he was travelling to Gaul, to come also to the Rhine for a conference 'by which the peace of churches and of the Christian religion might be increased and the state of the realm given us by God made sure by suitable decrees'.<sup>65</sup>

<sup>60</sup> *Constitutiones* 911–1197, 120–1, 605–15; *Die Briefe Heinrichs IV*, ed. C. Erdman, MGH Kritische Studientexte 1 (Leipzig, 1937), 22–6; tr. in *Imperial Lives and Letters of the Eleventh Century*, 161–5.

<sup>61</sup> *Constitutiones* 911–1197, 125–6.

<sup>62</sup> *Ibid.* 157–8, 164.

<sup>63</sup> *Ibid.* 165.

<sup>64</sup> *Conradi III [etc.] Diplomata*, 250.26.

<sup>65</sup> *Constitutiones* 911–1197, 179.

## GERMAN LANDFRIEDEN

The claiming of responsibility for the stable and peaceful condition of the commonwealth had become the basis of the political rhetoric of emperors. They affirmed not only the *stabilitas* or *bonus status* of the empire and the Church but also the states of particular churches, civic communities, and privileged individuals in their due place within the commonwealth, and the word 'state' thus acquired a variety of applications. On his return from Crusade the emperor thanked Eugenius for protecting the peace and tranquillity of the realm which the Supreme Majesty had granted him, adding that he also was ordained by God to be a protector of the Roman Church; consequently he was sending magnates to consult with the pope about 'the state of our holy mother the church of Rome and of other churches, as well as the restoration of the dignity of the whole Roman empire'. He was concerned for the ordering of 'the state and interests' (*de statu et utilitatibus*) of both church and laity, 'so that . . . the Roman empire with god's help be reformed to the strength of its ancient dignity'.<sup>66</sup> The accession of Frederick I of Hohenstaufen in 1152 brought an immediate intensification of imperial claims. Frederick demanded a pope who would 'reform the state of god's churches in a bond of peace, and treat the empire and the empire's vassals honourably'. In 1159 two rival popes were elected, Alexander III, a bureaucrat supported by the majority of cardinals, who were alarmed by Frederick's vigorous enforcement of imperial rights in Italy, and Victor IV, from a noble family traditionally loyal to the emperor. In order that 'the state of the city, which is the head of our empire, should be undisturbed', Frederick called the princes and prelates of the kingdoms of the west to a council at Pavia, where Victor was duly confirmed in office. When Victor died in 1164, he was replaced by Paschal III as imperial antipope, and Frederick held another council at Würzburg to 'establish [*stabilire*] and confirm the lord pope Paschal and his honour' and thereby 'strengthen the state of holy church'.<sup>67</sup>

Conrad took churches under his special protection, asking prayers 'for the quiet and peaceful state of our realm and of ourselves also', and announced that he was sending his protonotary to Italy to reform the

<sup>66</sup> *Conradi III [etc.] Diplomata*, 303.12, 306.32, 317, 333, 386, 395.8, 407.26 (*tam de statu sacrosancte matris nostre Romane ecclesie et aliarum ecclesiarum, quam de totius Romani imperii reformanda dignitate*).

<sup>67</sup> *Friderici I Diplomata*, 1158–1167, 24, 78, 90, 92, 97–8, 103, 134, 154, 217, 218, 396, 398, 491; C. Morris, *The Papal Monarchy: The Western Church from 1050 to 1250* (Oxford: Clarendon Press, 1989), 187–200.

state of that land (*statum terre*) for the better.<sup>68</sup> Both Conrad III and Frederick I made gifts to churches ‘in the confidence that following the examples of earlier kings and emperors would profit us and the state of our realm’ and bring ‘firm stability to the kingdom and lasting salvation to the souls of us and our kindred’.<sup>69</sup> In his diplomas for churches Frederick Barbarossa talked of ‘the state and necessities of the commonwealth (*res publica*)’ as well as of the safety of the country (*salus patrie*) and the dignity of the Roman Empire: for instance, when he placed the abbot of Borgo San Sepolcro under his protection, regulated the construction of dams on the Rhine at the petition of the bishop of Utrecht and the counts of Holland, Guelders, and Cleves, granted freedoms to the church and city of Aachen in imitation of Charles the Great, and for the benefit of his Italian subjects confirmed from a reading of the annals of his predecessors that the bones of St. Bartholomew had been translated from Benevento to Rome by Otto II.<sup>70</sup>

The diplomas were seen to preserve the *status imperii* by protecting the individuals and corporations within it in their legal status. The skill of an emperor was so ‘to care for the commonwealth and look out for the needs of his subjects that the interests of the kingdom remained undamaged and the status of individuals [*status singulorum*] preserved unharmed’, proclaimed Frederick in an edict of 1154 forbidding the alienation of fiefs without the overlords’ permission.<sup>71</sup> The clergy and vassals of the church of Cambrai were told that he was sending an abbot, a dean, and a chaplain to them to oversee the election of a new bishop, since the Roman emperors worked to preserve from harm their people *utriusque status*—both clerical and lay.<sup>72</sup>

It was in order to preserve ‘the most glorious state of the empire’ that two of Frederick’s ministers were dispatched on a mission to Hungary, which kingdom was ‘not in the state it should be’ after the usurpation of its throne. Foremost in an emperor’s concern for the state of a commonwealth were often the fortunes of the communities of townsmen. Finding himself in conflict with a league of north Italian cities, Frederick bought support with privileges. Imola and all its inhabitants

<sup>68</sup> *Conradi III [etc.] Diplomata*, 128.35, 213.20, 395.8, 408.26, 459.32.

<sup>69</sup> Fichtenau, *Arenga*, 75, 117; *Conradi III [etc.] Diplomata*, 151.21, and cf. 50.1; 51.36; 59.14; 250.26, 348.10; *Friderici I Diplomata*, 1158–1167, 263.15, 285.10; *Friderici I Diplomata 1181–1190*, ed. H. Appelt, MGH Diplomata RIG 10, part iv (1990), 129.16, 161.6, 199.35 etc.

<sup>70</sup> *Friderici I Diplomata*, 1158–1167, 35.10, 290.20 (Borgo San Sepolcro), 401.3, 408, 422.32 (dams on the Rhine), 432.28 (Aachen), 479.3 (St. Bartholomew’s bones), 487; *Friderici I Diplomata 1168–1180*, ed. H. Appelt, MGH Diplomata RIG 10, part iii (Hanover, 1985), 274.

<sup>71</sup> *Constitutiones 911–1197*, 207; for diplomas: *Conradi III [etc.] Diplomata*, 55, 128, 216, 515; *Friderici I Diplomata*, 1152–1158, 151–3, 1158–1167, 35.

<sup>72</sup> *Friderici I Diplomata*, 1158–1167, 487.2.

present and future were received into the emperor's protection, and the state of the city and its *contado* were confirmed in their entirety. The inhabitants of Treviso were likewise told that the emperor wished to promote their state and honour: they could keep their present consuls and 'the ancient state of the consulate' (*antiquum statum consulatus*) as long as they exercised justice according to the statutes of the law. Outside Italy, Frederick vowed to reform the church and city of Lyons to its ancient state of dignity, or so he said in a letter designed to recruit the French to the support of Pope Victor.<sup>73</sup>

In dealings with the imperial capitals of Rome and Aachen emperors often talked of the state of the whole commonwealth rather than of the cities themselves. In 1151 Conrad wrote to the prefect, consuls, captains, and people of Rome, from whom he had received since his return from crusade so many letters showing how they strove to promote his dignity and to reform the state of the Roman empire: Wibald, abbot of Corvey and Henry the notary were on their way to pacify and stabilize the affairs of the city and of Italy, and the Romans were to accept their instructions about what was to be done *in hoc temporis statu*.<sup>74</sup> The canonization of Charlemagne in 1165 was an occasion for Frederick to emphasize his efforts throughout the empire to preserve 'the rights of the church, the unharmed state of the commonwealth, and the integrity of the law', and to confirm Charles the Great's grant of liberty and justice to Aachen, 'which is the head and seat [*caput et sedes*] of the German kingdom'.<sup>75</sup> In the treaties which he concluded with Pisa and Genoa, whose naval power he needed for a projected campaign against the Norman kingdom of Sicily, Frederick likewise emphasized the aid these cities had given to 'the honour and glory of the empire and the state of the commonwealth'. Pisa protested its *imperialis status*, in the sense of its privileged position in the imperial commonwealth.<sup>76</sup>

Conrad's grant of extensive rights in Provence to a layman, Raymond of Baux, included the enfeoffment of the lands which Raymond's father-in-law, Count Gerbert, had held *quando in optimo statu fuit*—when he was in his best state.<sup>77</sup> The personal state of the greatest importance was, of course, the emperor's own, his physical condition first of all. On his way through Greece on crusade, Conrad kept his minister in

<sup>73</sup> *Friderici I Diplomata*, 1158–1167, 76 (Imola), 218 (Lyons), 326 (Hungary), 341 (Mantua), 344 (Treviso); *Friderici I*, 1181–1190, 54–9 (Lombard league of towns), 93 (Cambrai), 106, 148, 203, 268 etc.

<sup>74</sup> *Conradi III [etc.] Diplomata*, 455; for the pretensions of the city of Rome at this period, see R. L. Benson, 'Political *Renovatio*: Two Models from Roman Antiquity', in *Renaissance and Renewal in the Twelfth Century*, ed. Benson, G. Constable, with C. D. Lanham (Oxford: Clarendon Press, and Harvard UP, 1982), pp. 348–50.

<sup>75</sup> *Friderici I Diplomata*, 1158–67, 433.28.

<sup>76</sup> *Ibid.* 199.19, 220–5.

<sup>77</sup> *Conradi III [etc.] Diplomata*, 240.12.

Germany, Wibald of Corvey, informed of his healthy state (*de statu incolumitatis nostre*), and Conrad's son Henry promised to pass on to Wibald news of the emperor's state whenever he received a letter.<sup>78</sup> Reporting in 1160 on his crushing of his Lombard enemies Frederick told the patriarch of Aquileia that by the grace of God he was in a good state, because health, life, and prosperity crowded in on him and his family. If anything else was reported of him, the patriarch should know that 'it was not the gospel truth they preached'; equally false was the diminishing of the state of Pope Victor.<sup>79</sup>

The emperor's state could be understood in more abstract and 'constitutional' terms. Back from crusade, Conrad distinguished between 'the state of our office and the state of our person' (*honoris nostre status ac nostre persone*), when he gave thanks to the pope for their preservation and for the peace and tranquillity of the kingdom which he found on his return.<sup>80</sup> Frederick granted property to the church of Merseburg at the request of the Margrave Dietrich von der Lausitz, who had laboured assiduously 'for the state of the imperial crown'. And in 1163 he described Rainald of Dassel, his arch-chancellor in Italy as restoring imperial rights in Tuscany to their original integrity and 'reforming the commonwealth, under the rule of our peace, to its ancient state in which the imperial prerogative is supreme [*sub nostre tranquillitatis imperio in antiquum eminentis sue prerogative statum imperialis res publica reformatur*]'.<sup>81</sup>

Under Frederick I the *Landfriede* became a form of legislation which declared both the emperor's state and the rights and duties of the other estates which made up the realm. In the spring of 1152 the new 'king of the Romans' sent messengers to inform Pope Eugenius of his coronation at Aachen, of his undertaking there to give 'law and peace' to the whole people which God had committed to his charge, and of his measures to preserve 'the state of the church and kingdom'. In the summer of the same year, anxious that the laws, divine and human, might remain in full vigour, churches be preserved from harm, and every person keep safe his right (*ius suum conservare*), Frederick decreed a great peace that should hold in every part of the kingdom, its provisions set out in detail. For one who killed within the peace the penalty was death, and for one who wounded the loss of a hand, unless they could prove they had acted in self-defence (cc. 1, 3). For common assault the victim must be compensated and a fine paid to the judge: twenty pounds if there was beating with sticks and hair-pulling, five pounds if only punches and verbal

<sup>78</sup> Ibid. 353.29, 386-7.

<sup>79</sup> *Friderici I Diplomata*, 1158-1167, 139, 140-1; cf. *Friderici I Diplomata*, 1181-1190, 303.

<sup>80</sup> *Conradi III [etc.] Diplomata*, 528.

<sup>81</sup> *Friderici I Diplomata*, 1158-67, 187, 290.

abuse were exchanged (c. 4). The offender's property should be the pledge for payment of a twenty-pound fine (c. 5). A clerk who broke the peace or sheltered a peace-breaker, and was convicted before the bishop by sufficient testimony, should pay the count the twenty-pound fine as well as make satisfaction to the bishop according to the canonical statutes (c.6). Judge and people must go in pursuit of a notorious peace-breaker, whose lord must surrender him if he took refuge in his castle (c. 7).<sup>82</sup>

After these criminal provisions came two important clauses dealing with disputes over land-rights. The sitting tenant might ward off a claim to his land by bringing his lord before the count and making him prove 'by suitable witnesses' that the property had been his to grant (c. 8); if several claimants to the same land produced different grantors (*investitores*), a sworn verdict should be obtained from neighbours as to who had rightful possession, that is one gained without violence (c. 9). The next clause prescribed the ways in which people of different status should be tried for their crimes. A knight accused by another knight was to be allowed a judicial duel, once he had proved the knightly rank of his family; a knight accused by a peasant (*rusticus*) might bring four other knights to swear that he had not willingly broken the peace; and a peasant accused by a knight could choose either the judgment of God (an ordeal) or the verdict of 'suitable witnesses' chosen by the judge (c. 10). Economic clauses followed. Each count was instructed that in September he should choose seven men of good repute and with them decide the price of corn in his district according to the quality of the harvest; whoever sold it at a higher price during the next year should be deemed a peace-breaker and liable to the twenty-pound fine for each offence (c. 11). A judge should take away a lance or sword from a peasant found bearing them within his jurisdiction, or fine him twenty shillings (c. 12); but a merchant crossing the country on business might carry a sword on his saddle or in his cart to defend himself against robbers (c. 13). No one might set nets or other traps to take game but only to catch bears, wild boar, or wolves (c. 14). Anyone who abused his powers as an advocate (protector or lay steward of a church) and, though admonished by his overlord, did not mend his ways was to be stripped of his advowson and benefice by judicial process; if he dared to enter them thereafter, he should be held a peace-breaker (c. 17). Counts and judges were enjoined particularly to enforce laws and judgments within their jurisdictions against *ministeriales* (the formidable serf-knights of great lords) who engaged in warfare amongst themselves (c. 19). Finally, travellers were given permission to let their horses feed

<sup>82</sup> *Friderici I Diplomata*, 1152-1158, 10-11, 39-44; cf. *Constitutiones* 911-1197, 194-8.

as necessary on the herbage and young trees by the side of the road, but without laying them waste (c. 20).

In November 1158, at Roncaglia on the banks of the Po, 'exercising care for the commonwealth and the state of individuals' within it, Frederick confirmed for Italy as well as Germany his ordinance of 1154 proscribing the unlicensed alienation of fiefs, and added prohibitions on the division of duchies, marches, and counties. Vassals were now to answer for the behaviour of every member of their households towards overlords, under penalty of forfeiting their tenements. A lord should himself decide a dispute between two of his vassals over a fief, but a dispute between lord and vassal should be settled by the other vassals of his court. Also at Roncaglia Frederick issued an edict of perpetual peace, to which everyone between the ages of eighteen and seventy, 'dukes, margraves, counts, captains, vavassors, and rulers, with the great and small of every place', were to bind themselves by oath every five years. Special attention was given to corporate misbehaviour. A city breaking 'the aforesaid peace' should pay a fine to the royal treasury of a hundred pounds of gold; a duke, margrave, or count a fine of fifty pounds; an ordinary town, a captain, or a greater vavassor, of twenty pounds; any other, of six pounds. The stability of the commonwealth was seen to rest on the conduct of lordships and urban communities: other associations 'within or outside cities', even of blood-relatives, were totally forbidden. The impression is given that the realm was too large and the local magistrates too numerous and diverse to be centrally directed, even those appointed or confirmed by imperial authority: all that could be done was to prescribe fines for judges also when they neglected justice—or, if they were too poor to pay, then a whipping and five years exile from their homes. The one other general peace proclaimed by Frederick I, his constitution of 1186 *contra incendiarios* (against arsonists—and also, in fact, against those who destroyed vines and fruit-trees), was largely concerned with making outlawry effective, impressing on lords responsibility for their vassal's behaviour, and restraining aristocratic feuding: a lord who intended to pursue his opponent with force and arms must formally defy him at least three days in advance.<sup>83</sup>

Without a royal judiciary supervising a corps of local officials like the English sheriffs in enforcing these constitutions, the *Landfrieden* could not, as it turned out, provide the basis of a pan-German, let alone imperial, legal system and state. The state of himself and his empire, which Frederick constantly asked the clerical beneficiaries of his

<sup>83</sup> Ibid. 4–5, 32–6; Otto von Freising und Rahewin, *Gesta Frederici seu rectius Cronica*, ed. F.-J. Schmale (Darmstadt, 1974), 456–60 (III, 31); tr. C. C. Mierow and R. Emery in *The Deeds of Frederick Barbarossa* (New York, 1953), 202–4, 239–43; *Constitutiones* 911–1197, 449–52.

charters to pray for, was manifested not in his general dispensation of justice but in constant political interventions to confer lands and privileges which the lords should enjoy 'in perpetual stability', and to enforce his own and the nobles' rights.<sup>84</sup> His aim, a diploma of 1161 proclaimed, was to still the fury of dissension and create peace, friendship, and justice in an ordered state (*ordinatum statum*) of princes and ruler.<sup>85</sup> The major examples of the emperor's political action by diploma were the *Landfrieden* themselves, which were most effective when directed at particular localities. In February 1179, dispensing justice in his court at Würzburg, Frederick enacted a two-year peace for Rhenish Franconia, allegedly in answer to the request of the nobles and people of that land, and in fulfilment of his office 'to ordain peace throughout our whole empire for the necessity and state of the provinces (*per universum imperium nostrum pro necessitate et statu provinciarum pacem ordinare*)'. The chief object of this peace-ordinance was again to mitigate the results of feud—a man entering a town in flight from his enemy must be treated as a peace-breaker unless he threw away his arms at the gates; to make outlawry effective—a person outlawed for more than a year and a day might not be absolved, even by the emperor, until he had made satisfaction to the complainant in the case; and to urge the local *iudices* to do justice on alleged disturbers of the peace—though these had each to be allowed thirty followers armed with swords to support them in court. Before the witness-list of counts and nobles in this Franconian *Landfriede* there stands a description of the *terra* or *Land* within which the 'peace statute' should hold, which is simply a list of jurisdictions: the bishoprics of Speyer, Cologne, Trier and Würzburg, five hereditary 'counties' or 'provinces', and four other areas simply called *terrae*.<sup>86</sup>

Frederick presided over a realm where the law was enforced in what Karl Leyser called 'a teeming welter of developing princely and aristocratic lordships, lay and clerical, [and] a bewildering variety of substructures like counties, advocacies, immunities, burgraviates, *banni*, and *mundeburdia*. They did not possess any common underlying grid or shared development . . . like the English shires.'<sup>87</sup> The prescription in the *Landfrieden* of newly draconian penalties for a lengthening list of

<sup>84</sup> *Friderici I Diplomata*, 1152–1158, 73, 128, 198, 209, *Friderici I Diplomata*, 1158–1167, 155, 213, 233, 267, 274, 307 etc., especially for examples of requests for prayers for *stabilitas nostra vel totius regni* or *pro incolumitate nostra et regni statu* or *pro salute nostra et pro felici statu imperii nostri*; see also *Friderici I Diplomata*, 1168–1180, 61 ('de pace atque de statu regni tractare'), 328–30; *Friderici I Diplomata*, 1181–1190, 199 ('in bonum publice utilitatis statum reformare').

<sup>85</sup> *Friderici I Diplomata* 1158–1167, 174.19.  
<sup>86</sup> *Constitutiones* 911–1197, 380–3; B. Arnold, *Princes and Territories in Medieval Germany* (Cambridge UP, 1991), 44, 216.

<sup>87</sup> K. J. Leyser, 'Frederick Barbarossa and the Hohenstaufen Polity', *Viator*, 19 (1988), 153–76.



crimes was a substitute for royal control of local justice—this had to be left to the regional associations of aristocrats which remained at the core of every peace. The duchy, county, and ecclesiastical advocacy were redefined as the power to enforce the stern justice of the *Landfrieden*.<sup>88</sup> Already in 1151 Conrad III had invested the archbishop of Cologne with *ducatus* between the Rhine and the Meuse, in the hope that he would be able to restore peace to a troubled region. In 1156, by what has been called ‘the Magna Carta of the German territorial state’, Barbarossa created an entirely new type of duchy when he made the East Mark of Bavaria the *ducatus* of Austria for his uncle Henry Jasomirgott. This duchy was not based on tribal solidarity but on a grant of explicit powers within defined boundaries, of which the first was that no one should presume to exercise any justice without the duke’s permission. For his own duchy, Frederick was sometimes to be found holding court at Ulm ‘and providing carefully for the state’ of Swabia.<sup>89</sup>

As they competed for empire in 1207–8, Frederick’s son Philip of Swabia and the Welf Otto of Brunswick took it in turns to order firm peace to be established (*stabilire*) in Germany, ancient rights (*iura a Karolo Magno instituta*) to be observed, and the unjust imposition of new tolls and coinage to be ended. Peace-ordinances thus brought another area of activity within the purview of the territorial state. The exaction of tolls and *conductus*, the right to escort merchants through their lands and charge for it, were vital components of lordship in Germany.<sup>90</sup> When Barbarossa’s grandson Frederick II, the last and most spectacular of the Hohenstaufen kings, prepared to leave Germany in 1220 to seek imperial coronation at Rome, restore order in his other kingdom of Sicily, and embark on a crusade, he tried to ensure the prelates’ loyalty in his absence by issuing a ‘privilege in favour of the ecclesiastical princes’. First in this grant of exclusive jurisdiction within their territories stands the abolition of the new tolls and money which had been introduced during ‘the long perturbation of the empire’ and wars between advocates, and a promise to protect the churches’ ancient tolls and minting rights.<sup>91</sup>

<sup>88</sup> Arnold, *Princes and Territories*, 6, 25, 44–5, 62–5, 72, 95, 99, 101, 104–5, 118, 187–95; T. Reuter, ‘The Origins of the German *Sonderweg*? The Empire and its Rulers in the High Middle Ages’, in *Kings and Kingship in Medieval Europe*, ed. A. J. Duggan (King’s College London, 1993), 189–91.

<sup>89</sup> *Friderici I Diplomata*, 1152–1158, 259, 270; *Friderici I Diplomata*, 1168–1180, 5–7; *Gesta Frederici*, ed. Schmale, 276, 388–90, 428; Peter Munz, *Frederick Barbarossa: A Study in Medieval Politics* (London, 1969), 107.

<sup>90</sup> *Annales maximi Colonienses*, in MGH *Scriptores rerum Germanicarum* 18, ed. G. H. Pertz (Hanover, 1880), 822–3; *Friderici I Diplomata*, 1152–1158, 282–4, for a royal adjudication half a century earlier of complaints of the imposition of new tolls between Bamberg and Mainz; Arnold, *Princes and Territories*, 71–2, 177–9, 204–5.

<sup>91</sup> *Constitutiones et Acta Publica Imperatorum et Regum: 1198–1272*, ed. L. Weiland,

Frederick II did not return to Germany for fifteen years, but from time to time he called his son Henry, whom he had left behind as king, across the Alps to general courts held 'to reform the state of the empire'.<sup>92</sup> In February 1234 King Henry held a solemn court at Frankfurt and issued for the Germans a 'General constitution on giving justice and keeping the peace', which placed right judgment in the forefront. To set an example, Henry made a promise that he himself would preside in public court at least four days a month. Another prince convicted of neglecting his judicial duties should pay a hundred pounds in gold to the king; a count or other noble with jurisdiction who failed to judge according to the custom of the province should pay a hundred pounds of silver, and after three convictions the jurisdiction would be forfeit. Sentences of outlawry must be promulgated in public places, and lifted only when the outlaws gave surety that they would answer in court: if judges failed in this they were liable to restore the whole of what the victim of the crime had lost.<sup>93</sup>

Frederick was displeased by his son's alienation of the German nobility and at last returned to strip Henry of his kingship. Resumption of the emperor's rule in Germany was marked by the issuing of the greatest of the peace-statutes. At a court attended by 'almost all the princes of the German kingdom' at Mainz in August 1235, a new peace was sworn, old rights were established, new laws were promulgated, and the decisions were published abroad in written documents couched in the German language. This country-wide peace does indeed survive as both a Latin *Constitutio Pacis* and a German *fride und gesetze, daz der keiser hat getan*.<sup>94</sup> The preamble of the Latin version echoes the resounding phrases of the extensive Constitutions of Melfi which Frederick had ordained four years previously for his kingdom of Sicily. 'The necessities of worldly affairs and the urgings of divine providence', the *Liber Augustalis* of 1231 had declared, compelled the appointment of secular rulers as executors of the divine will 'to curb the lawlessness of the wicked and establish judgments for the people in matters of life and death; in this way everyone might be safeguarded in 'his fortune, lot, and state [*fortunam, sortem statumque*]'.'<sup>95</sup> The Latin version of the

MGH Legum Sectio 4, ii (Hanover 1896), 86–91, 285; D. Abulafia, *Frederick II: A Medieval Emperor* (London, 1988), 124–5, 129–30.

<sup>92</sup> For Henry's government of Germany and stormy relations with Frederick as Emperor, see *Constitutiones 1198–1272*, 210–13, 398–400, 418–20, 426–9, 431–3; *Historia Diplomatica Friderici Secundi*, 6 vols., ed. J. L. A. Huillard-Breholles, (Paris, 1852–61), 4, ii. 681–6; *Annales maximi Colonienses*, 837, 840, 842; Abulafia, *Frederick II*, 231–4.

<sup>93</sup> *Constitutiones 1198–1272*, 428–9; *Historia Diplomatica Friderici Secundi*, 4, ii. 635–7.

<sup>94</sup> *Constitutiones 1198–1272*, 241–63; *Historia Diplomatica*, 4, i. 1–177, ii. 945–7; *Annales maximi Colonienses*, 844; Abulafia, *Frederick II*, 240–1.

<sup>95</sup> *Historia Diplomatica*, 4, i. 1–177.

constitution of 1235 is similarly described as drawn up by Frederick II 'always august emperor of the Romans, king of Jerusalem and of Sicily', 'so that in the happy state of our times (*sub felici nostrorum temporum statu*) the government of peace and justice may be strong around the people subjected to our empire'. Specific laws to reform 'the general state and peace of the empire [*generalem statum et tranquillitatem imperii*]' had never before been introduced into Germany, the constitution goes on; there men had previously dealt with private matters by ancient and unwritten custom, and in the courts' opinion rather than the sentences of established law decided cases.<sup>96</sup>

The *Constitutio Pacis* of 1235 repeated the usual injunctions to everyone to respect the courts and property of the Church, to knights to observe truces, and to the parties in disputes to refrain from self-help and precipitate resort to feud. Again it enjoined all those who held rights of jurisdiction from the emperor to judge justly and see that their subordinate judges did likewise; revoked newly-established tolls and coinage; and forbade unauthorized *conductus* and the obstruction of public roads. The first fourteen chapters are thus in the tradition of the *Landfrieden*. The two novel elements of the constitution are in the remaining chapters 15 to 29, which comprise a stringent code of criminal law. Firstly, in chapters 15 to 21, ungrateful sons convicted of seizing their parents' property were ordered to forfeit their inheritances. Anyone who plotted the death or other personal harm of his father was to be deemed without the protection of a lord or of legal rights (*erenlos et rehtlos*), as were servants who aided him in his crimes, and witnesses were not to be excused from testifying simply because they were also members of the family, for this hateful and detestable crime was against divine and human law. In these chapters Frederick was surely providing justification for his treatment of his own son. Further chapters concerned outlawry. The walls of a town and of the house in which an outlaw sheltered should be pulled down, a township with no walls set on fire; the emperor would see it done if the local judge would or could not. The second innovation of the *Constitutio Pacis* appears in chapters 28 and 29. Because he was preoccupied with the affairs of many lands and regions and could not preside personally over the cases of complainants to the imperial court (*querelancium causas*), the emperor wished to have a man of proved trustworthiness and honest opinion to decide them in his place. This justiciar was to be a free man (i.e. not a *ministerialis*), who would sit in the royal court every day but Sundays and other major feast-days to do justice except in the most serious cases and those concerning the rights, honour, fees, property, or inheritance of great men, which the emperor reserved to himself. At the same time a 'special

<sup>96</sup> *Constitutiones* 1198–1272, 241.

notary' was to be appointed to record the names of outlaws and litigants, the substance of their cases, and the security given by discharged outlaws 'according to the custom of their localities' that they would satisfy the plaintiffs. The notary should also record the decisions given by the emperor himself in great cases, particularly where there had been conflicting opinions, so that there would be no ambiguity when similar cases arose in future.<sup>97</sup>

The emperor was following the son he had deposed in attempting to provide a system of justice for all Germany; this at a time when the kings of France, England, and Castile, and Frederick himself in Sicily, were also having to respond to the *querelae* of wider communities than their immediate vassals.<sup>98</sup> When he appointed a head justiciar for his Sicilian court, Frederick prescribed the way defendants should be brought to court: the letters of citation must say by whom and before whom and for what sort of matter the complaint (*querimonia*) had been submitted; and they must give the time within which the defendant was required to appear—in person, if it was a criminal prosecution, in person or through a representative if it was a civil action.<sup>99</sup> There survives a *formulae magnae imperialis curiae*, clearly a formulary of the Sicilian court since it refers to the seventh and twenty-fifth chapters of the Constitutions of Melfi, which is comparable to the registers of writs which were just beginning to appear in England. It contains forms equivalent to the English writs of right (no. 3) and novel disseisin (nos. 6 and 15), and particularly to writs of trespass seeking damages for injuries alleged to have been committed violently or clandestinely and therefore matters for the king's court because against the public peace. Thus, no. 23 orders the citation of a man accused of assaulting the complainant with a lawless gang, using prohibited weapons (*cum societate illicita et armis prohibitis*), and in contempt of the imperial peace; no. 29 of one alleged to have thrown the complainant into his private prison *imperiali pace contempta* (cf. also nos. 10, 11, 22, 29).<sup>100</sup>

<sup>97</sup> *Constitutiones 1198–1272*, 246–7, 261–3; cf. E. Klingelhofer, *Die Reichsgesetze von 1220, 1231/2 und 1235* (Weimar, 1955), 97–112.

<sup>98</sup> For Frederick's appointment in 1234 of justices to meet twice-yearly in five named towns to do justice to anyone wishing to complain of injuries (*conqueri de damnis et injuriis*) inflicted by the king's officials, see *Historia Diplomatica*, 4, ii. 460–3; for *querelae* in France and England, see Ch. 6 below, and A. Harding, 'Plaints and Bills in the History of English Law, mainly in the period 1250–1350', *Legal History Studies* 1972, ed. D. Jenkins (Cardiff, 1975); for Castile, see E. S. Procter, *The Judicial Use of the Pesquisa in Leon and Castile* (EHR supplement no. 2, 1966), 32.

<sup>99</sup> *Historia Diplomatica*, 4, i. 49–50, 54–5, 64–6.

<sup>100</sup> *Acta Imperii Inedita Saeculi XIII et XIV* (Urkunden und Briefe zur Geschichte des Kaiserreichs und des Königreichs Sizilien), 1 (1198–1273), ed. E. Winkelmann (Aalen, 1964), 721–30; for English writs, see *Early Registers of Writs*, ed. E. de Haas and G. D. G. Hall, Selden Soc. 87 (London, 1970); and for writs of Trespass, *Roll of the Shropshire Eyre of 1256*, ed. A. Harding, Selden Soc. 96 (1981), pp. xxxii–lviii.

THE TERRITORIAL STATES OF GERMANY

The constitution of 1235 gave the special notary responsibility for receiving bills of complaint (in the German version: *die brive, die umbklage sint*) and for summoning defendants from throughout Germany.<sup>101</sup> But a constitution framed for 'the general state and tranquillity of the empire' remained at a distance from the localities and their needs. No new regional justices were to be appointed for Germany in 1235 as they were for Sicily in 1231; no itinerant royal justices or inquisitors were provided to hear the complaints of the people in the same manner as in Spain, England, and France; and the chief justiciar and special notary are virtually invisible in the years that follow.<sup>102</sup> The law used every day in Germany continued to be the mixture of customary law ('Landrecht') and the rules of feudal landholding ('Lehnrecht') described in Eike von Repgow's *Sachsenspiegel* (1220s) and the other 'mirrors' of regional societies such as the *Schwabenspiegel* (1275/6).<sup>103</sup> The *Landfriede* of 1235, without limitation of time or place and not reliant on communal oaths, was an ultimate assertion of the ruler's legislative authority, but the nature and extent of the empire hampered in Germany the fusion of law-making with justice-doing which would elsewhere provide the foundation of states. Frederick II's and Henry VII's German constitutions were compelled to emphasize the responsibilities of the nobles for the enforcement of the peace as 'provincial judges' (*iudices provinciae*), and the jurisdiction of the local courts (*Landgerichte*) remained as complete as the royal court's, though the king could call any case into his presence, and powerful litigants could appeal to him.<sup>104</sup>

With Frederick's death in 1250 and the papacy's eradication of the Hohenstaufen dynasty, any sense of dynastic legitimacy was replaced as the mainstay of German kings by their role as promoters of peace. In March 1255 the elected 'king of the Romans', William count of Holland, appointed Adolf count of Waldeck 'our and the commonwealth's general justiciar' to promote 'the tranquil state' of the empire's faithful subjects. At Mainz in the same year, the consuls and magistrates of more than seventy cities of Upper Germany established by the

<sup>101</sup> *Constitutiones 1198-1272*, 242-3 (caps. 4-5 of the 1235 *Landfriede*), 262.

<sup>102</sup> H. Angermeier, 'Landfriedenspolitik und Landfriedensgesetzgebung unter den Staufern', in *Probleme um Friedrich II*, ed. J. Fleckenstein (Sigmaringen, 1974); *Handbuch der Quellen und Literatur der neueren europäischen Privatrechtsgeschichte*, i. *Mittelalter*, ed. H. Coing (Munich, 1973), 405-6, 591; Arnold, *Princes and Territories*, 191-3.

<sup>103</sup> *Sachsenspiegel Landrecht*, ed. K. A. Eckhardt, MGH *Fontes Iuris Germanici Antiqui*, NS 1 (i) (Göttingen, 1973), 140-7 (2.12-2.16).

<sup>104</sup> *Constitutiones 1198-1272*, 74.32, 75.5, 242-3 (caps. 4 and 5 of the 1235 *Landfriede*), 244.26, 607.38; Arnold, *Princes and Territories*, 6, 45, 65.

mediation of this justiciar 'a firm peace and stable truces amongst the prevalent wars and discords'.<sup>105</sup> Richard of Cornwall, brother of Henry III of England, chosen to succeed William by four of the seven German princes now recognized as electors, continued to promote general peace and reduce tolls throughout Germany.<sup>106</sup> The true heir of the Hohenstaufens, in Germany at least, was Rudolf of Habsburg, the Swabian nobleman elected after Richard's death in 1272. Though he never achieved coronation as emperor, he was recognized as king of the Romans by Pope Innocent V, who expressed concern for 'the public state' in Germany and Rudolf's needs in particular (*status publici et tuis precipue utilitatibus*).<sup>107</sup>

Rudolf saw his role as 'the reformation of the lost peace of the commonwealth', and in a Reichstag at Nuremberg in 1274 asserted the ultimate jurisdiction of the king in all cases civil and criminal. From 1274 to 1282 Bertholt von Druchburc is found issuing writs and pronouncing judgments as judge of the king's court (*Hofrichter* or *imperialis aule iustitarius*), mostly in suits concerning major churches, and from 1286 to 1291 Herman von Bonsteten appears in that office. The defeat and death of the great King Ottokar brought the kingdom of Bohemia firmly within the German Reich and allowed Rudolf to make the duchy of Austria, which Ottokar had held, the basis of the Habsburgs' centuries-long pre-eminence. In 1276, 'wishing to recreate [*reformare*] the good state which existed of old, turn emergency to advantage [*statum bonum veterem reformare et emergentia in melius commutare*], and, as befitted imperial majesty, give every man his right', Rudolf promulgated a five-year peace at a council of princes, counts, barons, and *ministeriales* of the lands of Austria, Styria, Carinthia, and Carniola assembled at Vienna. Three clauses (8–10) of this virtual rehabilitation of Austrian society sought to restore the authority of territorial lords: in particular, no one was to receive the vassals of another without his permission, saving the liberties often granted to municipalities to take them in. Then, judges were instructed to give killers time to make peace with the victim's kin 'in friendly fashion' (*amicabiliter*), and to authorize the giving of pledges. New tolls imposed against the custom of the land were ordered to be removed, along with castles erected to the prejudice of others' rights, though fortifications which

<sup>105</sup> H. Angermeier, *Königtum und Landfriede im deutschen Spätmittelalter* (Munich 1966), 45, 54–7; *Constitutiones* 1198–1272, 474–8, 592, 646; *Constitutiones et Acta Publica Imperatorum et Regum* 1273–98, ed. J. Schwalm, MGH Legum Sectio 4, iii (Hanover, 1904–6), 22, 28, 59–61, 97, 554–60.

<sup>106</sup> *Constitutiones* 1198–1272, 489; Angermeier, *Königtum und Landfriede*, 54–7; see B. Weiler, 'Image and Reality in Richard of Cornwall's German Career', *EHR* 113 (1998), for the argument that Rudolf created the legend of Richard of Cornwall's impotence as king.

<sup>107</sup> *Constitutiones* 1273–98, 97.26; Angermeier, *Königtum und Landfriede*, 53 ff.

Ottokar had destroyed could be rebuilt without the need of Rudolf's specific licence. Finally the local magistrates (*terrarum iudices*) were instructed, under threat of heavy penalties, to enforce the privileges of nobles, *ministeriales*, and others, as they were hitherto approved by the law and custom of particular territories.<sup>108</sup>

This Austrian peace was not intended as a surrender of the king's peace-jurisdiction to the lords of the land, but rather acknowledged that effective peace would be established by local arrangements, and it marked the beginning of a royal strategy of legislating piecemeal for the needs of individual provinces. In 1281 Rudolf gave his authority to the *Landfriede* sworn in Bavaria at his order (*nach unserm gebot*) and renewed Frederick II's peace of Mainz for Franconia and the Rhineland for a period of five years; and the five-years-old Austrian peace was continued by the oaths of the towns, knights, and esquires of the duchy in the presence of the lords of the land. Rudolf enforced peace by the time-honoured method of constant journeying through his realm, sanctioning as he went the peace-leagues sworn by the local nobilities and townsmen and emphasizing the responsibilities of local judges. But his reign saw an important new development: the issuing of specific commissions to preserve the peace locally. Ottokar may have shown the way in the peace he instituted for Austria in 1256 or soon after, which prescribed the appointment of four *Lantrichter*, two for the north bank of the Danube and two for the south. By 1274 the count of Württemberg, the Habsburg's neighbour in Swabia, was acting as King Rudolf's *iudex provincialis* at Ravensburg. When he intervened in 1277 to provide for the observance of a general peace-agreement among the cities of the middle Rhine, the king promised to appoint a nobleman to act in his place while he was preoccupied with the cares of empire and to fulfil the ruler's duty to ensure the good and tranquil state of peace in the land (*bonum pacis et tranquillum statum terre*); Frederick count of Leiningen soon appears as *iudex provincialis* there.<sup>109</sup>

The term 'judges or keepers of the peace' (*iudices sive conservatores pacis*) is used of eight men (two of them friars) who were appointed to punish malefactors in Swabia and Bavaria under an agreement of 1282 between King Rudolf and Lewis of Wittelsbach, duke of Bavaria and Count-Palatine of the Rhine. From the people of Thuringia there came a plea for the king to invest a noble with an imperial banner as 'captain' there (*cum vexillo imperii capitaneus*), with whose help they might restore the peace and state of the territory, disturbed by the oppressions

<sup>108</sup> *Constitutiones* 1273-98, 59-61, 116-18; for the *Hofrichter*, *ibid.* 554.15, 555.10 and 30, 557.20, 558-60; Angermeier, *Königtum und Landfriede*, 60 ff.

<sup>109</sup> *Constitutiones* 1198-1272, 607-8 (cc. 17-19, 29-31), for Ottokar's *Lantrichter*; *Constitutiones* 1273-98, 149-51, 222, 265-6, 275-88, 370-7, 382-4, 443-8, 611, 621-2; Angermeier, *Königtum und Landfriede*, 67-76.

of its own landgrave. In 1286 no lesser man than the archbishop of Mainz was made 'captain and rector' in Meissen and Thuringia to return them to a 'peaceful state', and an oath was sworn and a tax raised to support his efforts. This was a response at the highest level to a political crisis—the 'imperial vicar and captain of the peace' was given the full extent of *merum et mixtum imperium*—but in both Thuringia and Saxony the task required the efforts of lesser captains working with a number of judges *super pacis observancia*. There were twelve of these justices in Thuringia; further south eleven conservators or judges 'of the general peace' are found attempting to settle a dispute between citizens of Strassburg and Seltz.<sup>110</sup> It is worth noticing that there was a similar appointment of 'captains and keepers of the peace' (*capitanei et custodes pacis*) in English counties at the end of the war of 1263–5 between the barons and King Henry III.<sup>111</sup> The captain was an ambiguous figure, whose appearance marks a stage in the transition from a feudal to a governmental order in both countries. He was a 'chieftain' drawing authority from his territorial status—but also from a royal commission. The title of landgrave, for a new type of count with a wide territorial authority, also emerged in the period of the *Landfriede*, along with a new class of *Lantrichter* or provincial magistrates. These jurisdictions, like the *Landrecht* which Eike von Repgow placed alongside *Lehnrecht* or feudal law, were founded on local custom as well as royal mandate.<sup>112</sup>

England was small enough to allow the government to control, though sometimes with difficulty, the local potentates it had itself raised up as *custodes pacis*. In far bigger Germany, Rudolf's reinforcement of peace-agreements which had always relied upon the subscription of provincial aristocracies served in the end to foster separateness. It was at the provincial level that legislation for social peace and its judicial application would coincide to make states. Through much of the thirteenth century the Rhine towns and the nobility of the region were forming peace-leagues for themselves, sometimes in conjunction and sometimes in opposition, for the toll-regimes of the nobles were a provocation to the townsmen. The great Rhine league of 1254–7 was formed by the swearing of 'a holy peace' by the *iudices*, consuls, and whole citizenry of Mainz, Cologne, Worms, Speyer, Strassburg, and Basle: the cities of Nuremberg and Regensburg, the towns of Westphalia, the archbishops, bishops, and abbots of the Rhineland, the

<sup>110</sup> *Constitutiones* 1273–98, 331–2, 363–4, 367–8, 382–4, 416–17, 420, 471, 527–9, 611–13, 623–6; Angermeier, *Königtum und Landfriede*, 72–3; Arnold, *Princes and Territories*, 62–5, 130–2, 215–16.

<sup>111</sup> A. Harding, 'The Origins and Early History of the Keeper of the Peace', *TRHS*, 5th ser. 10 (1960), 97.

<sup>112</sup> *Constitutiones* 1273–98, 625, for a letter from a *Lantrichter*.



count-palatine, the duke of Brunswick, the margrave of Brandenburg, and a number of lesser nobles then joined what was essentially an uneasy policing agreement. The original agreement of 1254 envisaged the election of four faithful men to settle discord within the league by promoting compromise or giving judgment (*per amicabilem compositionem vel per iustitiam*), and later it was proposed that eight nobles and eight citizens should meet, with the king as president, to see to the strengthening of the general peace.<sup>113</sup>

In the Rhineland the king was reduced to holding the balance between the leagues of towns and the princes who usually proclaimed peace within their lordships and provided for its enforcement. In June 1264 Wernher, archbishop of Mainz, and Lewis, count-palatine of the Rhine and duke of Bavaria, 'for the good state of their men and lands', swore that until the end of two years from St. John the Baptist's day next following they would maintain a continuous peace 'commonly known as a Landfriede' (*que lantfrede vulgariter appellatur*). Each would aid the other in the assertion of his rights and liberties, assist counts and others with judicial powers to do justice, and punish judges who failed in their duty out of malice or favouritism. Under a three-year peace sworn in 1265 by Archbishop Wernher, certain nobles, and the towns of Frankfurt, Friedberg, Wetzlar, and Gelnhausen, suits by nobles against citizens were to be heard within the cities according to their customs, and against lesser persons before the ordinary judges, but cases brought by burgesses against nobles should come before eight special *executores pacis*. The independence of such an arrangement of imperial government is clear when it is said to be for defence against threats from whatever quarter (*contra quodlibet*) and there is a clause prohibiting the inclusion of anyone else in the confederacy without the unanimous consent of the original members.<sup>114</sup>

In the Rhineland the conflicts of princes and townsmen and the importance of commerce combined to demand special peace arrangements. But in Hesse too the bishop of Paderborn and the landgrave swore a three-year peace with the other lords in 1265, and nominated twelve knights to decide complaints of injury 'by friendship or by law' (*in amicitia vel in iure*).<sup>115</sup> For Silesia the duke issued a more high-sounding edict in 1277/8, in fulfilment of his obligation 'to reform the *status terre*, deformed by wicked deeds, to the cultivation of justice': the duke and the barons swore not to harbour malefactors, and knights

<sup>113</sup> *Constitutiones* 1198-1272, 409-10, 477-8, 579-96; Arnold, *Princes and Territories*, 173-4.

<sup>114</sup> *Constitutiones* 1198-1272, 608-16; *Constitutiones* 1273-98, 604-6, 619; Angermeier, *Königtum und Landfriede*, 62; Arnold, *Princes and Territories*, 190 ff.

<sup>115</sup> *Constitutiones* 1198-1272, 610-11, 614-15; Angermeier, *Königtum und Landfriede*, 36, 66-8, 76-7.

were appointed in pairs to inquire with two citizens of each town about notorious robbers, arsonists, and evildoers of all sorts.<sup>116</sup> In Bavaria, perhaps best of all, the peace-oaths of the duke and the princes of that land can be seen as the foundation of the *Landrecht*, the working law of Germany.<sup>117</sup>

The power of the *Landfriede* to consolidate new political entities was forcefully demonstrated on both the northern and southern margins of Germany. At Rostock in 1283 John Duke of Saxony, Bogislav duke of Pomerania and other north German princes formed a peace-association with Wismar, Rostock, Stralsund, Greifswald, Stettin, and other towns within their lordships, and with the imperial city of Lübeck under whose leadership these ports would make up the core of the Hanseatic league. The profits of peace to men and lands were known to all, they declared, and having at heart peace and a good state (*pax bonusque status*) they had sworn to assist one another in all just causes. The agreement stipulated that the towns should combine to provide two hundred war-horses to the lords for defence against external threats, and set down the number the lords should bring to the aid of the towns; the service of the villeins was also defined, at the rate of one appropriately armed man and a horse from every six manses of land. Within the league's territory the roads must be kept peaceful for travellers, and murderers, arsonists, and thieves must receive the full penalties of the law, not to be spared in return for payment. These agreements and statutes (*placita memorata et statuta atque pax*) were to last for ten years, after which the vassals and townsmen might extend them for as long as they chose, but not bind the lords; within those ten years vassals would inherit the sworn obligations of their fathers and should renounce their homage to lords who departed from the peace. Rectors and judges should be chosen from the vassals and more discreet townsmen in each lordship and *Land (terra)*, and they should meet four times a year (at Easter, Midsummer, Michaelmas, and the beginning of January) to make new ordinances and correct whatever in the peace needed correction. What could not be sorted out by them was to be left to the judgment of the duke of Saxony, who had been chosen as *iudex at capitaneus* for the whole institution.<sup>118</sup>

The Baltic peace shows the *Landfriede* developing into a confederation which mobilized all sections of a regional community for both internal policing and defence against external threat. But a league of feudal lords with maritime towns pursuing international trading interests could not easily grow into a territorial state. Better material lay

<sup>116</sup> *Constitutiones* 1273–98, 601–4.

<sup>117</sup> *Ibid.* 1198–1272, 570–9.

<sup>118</sup> *Ibid.* 1273–98, 606–10.

on Germany's southern margins in the alpine valleys of Swabia, where there was a different balance between an independent peasantry, their lords, and the towns. The peace sworn there in 1291 amid the uncertainties following the death of King Rudolf of Swabia, and the Electors' rejection of his son Albert, duke of Austria, as his successor, was similar in substance and tone to the Baltic alliance. The public utility, the charter declared, was served when a due state of peace was consolidated. Everyone should know that for this reason the men of the valley of Uri and the whole body (*universitas*) of the valley of Schwyz and the *communitas* of the men of Unterwalden (*Intramontanorum Vallis Inferioris*), knowing the evil of the time, had sworn an oath of mutual assistance, so that they and their possessions might be better defended and kept in a proper state (*in statu debito*). Renewing its oath to the ancient confederation of the valleys, each *universitas* promised that in any emergency it would hasten to support another at its own expense, every man serving under his lord according to his condition. Within their communities they would have no judges who judged for money or came from outside the province. Dissension amongst the subscribers to the oath (*conspiratos*) should be settled by the more prudent among them. The killer of an innocent person should lose his own life and any who protected him suffer exile; arsonists also should be excluded from the community. The goods of those who plundered or damaged others' property might be seized to compensate the victims, but nothing should be taken as a pledge except for the repayment of an acknowledged debt and with the permission of a judge. All the *iurati* must aid the enforcement of judicial decisions, and protect the other litigants if one party refused to accept a judgment in a dispute. The deed, authenticated by the seals of the three communities and valleys, ordered that the above statutes, soundly made for the common utility, should endure for ever, under God's will.<sup>119</sup>

The oath of 1291, which is generally taken to have been the founding act of the Swiss polity, stands in the long tradition of peace-making and the settlement of feuds. On Swiss resistance to Habsburg attempts to reassert their rights as landlords and stewards of monasteries in this part of Swabia, and on the Emperor Lewis of Bavaria's enlistment of 'all his men of the valleys of Schwyz' against his Austrian rivals, writers from the fifteenth century onwards built the myth of a political struggle for freedom stretching back to the death of the good King Rudolf and the heroics of William Tell. The reality was a piecemeal linking of the

<sup>119</sup> Ibid. 443–8 for the German peace of 1291; for the text of the Swiss oath in the same year, see Peter Blickle, 'Friede und Verfassung: Voraussetzungen und Folgen der Eidgenossenschaft von 1291', in *Innerschweiz und frühe Eidgenossenschaft: Jubiläumsschrift 700 Eidgenossenschaft* (Olten, 1990), i. 28–9.

towns to the original confederation—Lucerne in 1332, Zurich in 1351, Zug in 1352, and Berne in 1353—and the purchase by thousands of peasants of outburgher rights. Switzerland was forged from a network of alliances between the towns and valleys for the protection of their separate liberties, and for the keeping of the peace, especially on the roads to the vital Alpine passes.<sup>120</sup>

In the fourteenth century *Landfrieden*, now generally in the vernacular, came to register the political standing of king, princes, and towns in relation to each other: the peace of each region took on the character of a confederacy of the estates made and remade with royal approval as the political situation demanded. The princes saw the advantage of *Landfrieden* to themselves, but were generally suspicious of urban associations, to which royal attitudes were ambiguous.<sup>121</sup> The Emperor Charles IV's famous Golden Bull of 1354 was an embryo constitution, defining the electoral college and regulating its proceedings, but it also had elements of a *Landfriede*. A lengthy opening section ordered the protection and provisioning of electors and their retinues on the way to Frankfurt for the election of a king. Any who neglected their responsibilities in this respect should be counted as acting 'against the commonwealth and the state and dignity of the empire'. On pain of losing their liberties, the citizens of Frankfurt, 'of whatever dignity, condition or state', were to give protection to the electors, each of whom was to come to the town with no more than two hundred horsemen, only fifty of them armed. The rest of the document was concerned with the status and jurisdiction of the electors, whose unity and concord was vital for the 'happy state' of the empire. All the electors were given exclusive rights to exploit mineral deposits within their territories. From Bohemia, no one 'of whatever state, dignity, pre-eminence or condition' might be cited to appear outside the jurisdiction of the king of Bohemia for any cause, criminal, civil, or mixed. The same privilege was extended to the ecclesiastical electors and then to the other lay electors, except that complaints of denial of justice could be brought to the emperor. The constitution broadened out to a general prohibition of unjust wars and law-suits, and most strikingly of 'conspiracies', that is sworn associations of cities or persons 'of whatever dignity, condition or state', beyond 'those confederations and leagues which princes and

<sup>120</sup> Peter Blickle, 'Das Gesetz der Eidgenossen: Überlegungen zur Entstehung der Schweiz 1200–1400', *Historische Zeitschrift*, 255 (1992), 565; id., 'Friede und Verfassung', 18–42; T. Scott, 'Liberty and Community in Medieval Switzerland', *German History*, 13 (1995), 103–4, 109–10; *Constitutiones et Acta Publica Imperatorum et Regum 1313–24*, ed. J. Schwalm, MGH Legum Sectio 4, v (Hanover, 1909–13), 718.

<sup>121</sup> Angermeier, *Königtum und Landfriede*, 220–5; Arnold, *Princes and Territories*, 278; *Deutsche Reichstagsakten [DRTA]* (repr. Göttingen, 1956– ), i (1376–87), 315–25, 335–49, for the making of the Rhine *Landfriede* of 1382.

cities are known to form concerning the general peace of provinces and territories'.<sup>122</sup>

The reigns of Charles and his son Wenceslas saw the *Landfrieden*, as local associations for the keeping of the peace backed by royal authority, begin to be dissolved by a politics which opposed leagues of nobles and knights to the town leagues and forced the king to take sides. Though rooted in the *Landfrieden*, the urban associations now came under the ban of the 'conspiracies' in the Golden Bull.<sup>123</sup> Sigismund, king of Hungary, who was elected king in 1410, deployed *Landfrieden* against the Hussites of Bohemia, but in Germany he found peace measures dependent on the initiative of provincial meetings of estates under the leadership of the princes. Among the sixteen propositions for reform that he put to the estates in the Reichstag in 1434 were that the violent pursuit of legal rights should end; that every man should receive justice in courts both lay and ecclesiastical, the latter ceasing to hear secular cases (*cause prophane*); that criminal cases in the secular courts should be decided only by the verdict of proper jurymen (*scabini*); and that the notorious 'secret' courts, the popular tribunals spreading out from Westphalia should be brought under control. But to the imposition of peace by royal order and the suggested appointment of a *Hauptmann* to oversee the keeping of the peace in each of four (later six) 'circles' (*Kreise*) the estates replied with an affirmation of the rights of princes, counts, and lords to administer justice in their own courts. After the return of the Habsburgs to the kingship in 1438 the debate about the reform of imperial government intensified.<sup>124</sup>

In 1495 Maximilian I made a perpetual peace (*ewiger Landfriede*) central to his great scheme for the reform of imperial government, but again the appointment of royal 'administrators' of the peace was rejected by the estates, and the first article prohibiting persons of whatever status or condition from carrying on private wars and descending with fire and sword on castles, towns, markets, or homesteads ordered disputes to be settled in the ordinary courts. The role of the *Landfriede* in forming the German constitution was to promote *Kleinstaaterei* rather than a vision of Germany as a unitary state: the Golden Bull had marked the failure of that. From the beginning the vernacular *Landfrieden* had dispensed with the solemn preamble of the *Constitutio*

<sup>122</sup> *Die Goldene Bulle Kaiser Karls IV, vom Jahre 1356*, ed. W. D. Fritz, MGH Fontes iuris Germanici antiqui 11 (Weimar, 1972).

<sup>123</sup> DRTA i (1376-87), 345, 373; DRTA ii (1388-97), 493-4; Angermeier, *Königtum und Landfriede*, 254-61, 266-82, 314, 318-21, 350-3; Arnold, *Princes and Territories*, 250, 278;

<sup>124</sup> DRTA viii (1421-6), 141, 147, 219-20, 290, 315-16, 391-2; DRTA ix 287, 365, 541-3; DRTA xi (1433-5), 503-22; DRTA xii (1435-7), 143-53 (esp. p. 144); DRTA xiii (1438), 157-65, 443-60 (esp. 446, c.5); DRTA xv (1440-1), 406-25; DRTA xvi (1441-2), 388-96.

*Pacis* of 1235 with its talk of reforming ‘the general state of the empire’. *Staat*, the vernacular term for the commonwealth which was starting to be used in the fifteenth century, does not appear in them. Maximilian’s Public Peace is prefaced by a description of the threat to the empire which required to be met ‘with statesmanlike and mature counsel’ (*stattlichem, zeitigen rate*), and article six of the peace acknowledges cases where ‘the help of the state was needed’ (*das statlicher Hilff . . . Not ware*) against obdurate malefactors, and the injured parties should therefore be allowed to appeal directly to the *Reichskammergericht* and the yearly diet of the electors, princes, and estates of the kingdom. But what is repeatedly emphasized is the responsibility of ‘the electors, princes, prelates, counts, lords, body of knights, towns [*stette*] and everyone else, whatever their stations or conditions [*standes oder wesens*]’, for preserving the peace of their localities.<sup>125</sup>

<sup>125</sup> *Deutsche Reichstagsakten unter Maximilian I*, 5: Reichstag von Worms 1495, 1 (i) ed. H. Angermeier (Göttingen, 1981), 359–91; Angermeier, *Königtum und Landfriede*, 360–77, 548–66.

## CHAPTER FIVE

# The Judicial Systems of France and England

THE SYSTEMS for the administration of justice which developed in France and England brought together 'the state of the king and the kingdom' to create polities more unified than in Germany. The western kingdoms, especially England, were more compact territories and easier to administer centrally, and kings could also build on feudal relationships. In Gianfranco Poggi's words: 'feudalism established the notion that argument (however irrationally and violently conducted) about rights and justice (however particularistically understood) constituted the standard way of setting the boundaries of rule and of confronting and correcting misrule'.<sup>1</sup> The strength of the French and English monarchies rested on the strength of the communities of the lordships and communes which they brought under their jurisdictions. In the Capetian domains, the duchy of Normandy, and the kingdom of England, the machinery of justice grew from appeals to the king when justice could not be got from immediate lords. To make them more effective, 'private' charters were often taken to the king for confirmation. It was a matter for the king's courts when grants which he approved were infringed; all the more so, of course, when infringement was of privileges he himself had granted to churches or urban communities.

## JUSTICE ON COMPLAINT TO THE KING OF FRANCE

The Capetian kings shared with their German counterparts a strong allegiance to the Church's ideal of peace, but like the Norman and Angevin kings of England they depended for the building of their state on their skill in arbitrating between powerful feudatories and harnessing the energies of the towns. The bulk of the *Life of Louis VI*, king of France from 1108 to 1137, written by Abbot Suger of Saint Denis, is concerned with the military expeditions of his idol to deal with the

<sup>1</sup> G. Poggi, *The Development of the Modern State: A Sociological Introduction* (London, 1978), 33.

complaints (*querelae*) of churches against the turbulent barons of the royal demesne—and then to correct injuries committed far beyond the Île de France, demonstrating that ‘kings have long arms’.<sup>2</sup> Louis’s *acta* show even better than the expeditions which Suger chronicled that what Louis promoted was a newly vigorous royal peace. As must usually have been true of the writs of English kings, his orders were issued in response to petitions from a great variety of supplicants, clerical and lay, who came into the king’s presence with their complaints. There was the same development in France as in England towards more succinct charters and peremptory mandates to enforce the king’s awards. Under Louis VI and his successor Louis VII (1137–80) the invocation of God’s anger on the infringers of a charter or judgment is more often supplemented by the naming of guarantors (*obsides*: ‘hostages’) of the grant, perhaps including the king himself;<sup>3</sup> or by threats of royal indignation or separation from the king’s love (recalling ‘on pain of losing my friendship’ in Anglo-Saxon royal charters), for frustrating the grant and violating royal majesty. A brief mandate ending with a curt *valete* might notify the king’s provosts and ministers of a grant to a church of freedom for its men from tolls within the king’s lands, a grant which they were to enforce with vigour.<sup>4</sup> But usually the notification is to everyone in the present and the future (*tam presentibus quam futuris*), and a grant is recorded as enacted publicly in the royal palace before magnates and sealed with the royal seal, so that it might be preserved from oblivion.<sup>5</sup> These procedures may be described as ‘protection for the lasting stability’ of the grant (*perpetue stabilitatis . . . munimentum*), but also for ‘the health of our soul’ and ‘the stability of our kingdom’. There may be talk of depositing the deed in ‘public archives’.<sup>6</sup>

An element of dispute-settlement is obvious in many twelfth-century royal acts: a grant was often made to protect a church when its immunities were challenged, and was intended ‘by royal power to reform it to the state and wholeness of its ancient liberty’.<sup>7</sup> In a charter of 1112 Louis VI declared that the governing of a kingdom (*regni gubernaculum*) required vengeance by the sword on those who acted in

<sup>2</sup> Suger, *Vita Ludovici Grossi Regis*, ed. H. Waquet (Paris, 1964), 26, 70, 78–90, 135, 180.

<sup>3</sup> *Recueil des Actes de Louis VI, Roi de France (1108–1137)*, 3 vols., ed. R.-H. Bautier and J. Dufour (Paris, 1992–3), vol. iii (introduction), pp. 65–73, 83–98, 133–4, 141–53, 184–6; A. Luchaire, *Études sur les Actes de Louis VII* (Paris, 1885), 3–15.

<sup>4</sup> *Recueil des Actes de Louis VI*, i, nos. 126, 130, 181, 182, ii, nos. 293, 299, 300, 307, 366, 402, 403, 416; Luchaire, *Études sur les Actes de Louis VII*, 354 (no. 33), 355–6 (no. 36), 356–7 (nos. 39, 40), 370 (nos. 126, 130), 380–1 (nos. 181–2), 394 (no. 307), 396–7 (nos. 320, 325), 414 (no. 420), 448 (no. 652), 462–3 (no. 766).

<sup>5</sup> *Recueil des Actes de Louis VI*, i, nos. 130, 181, 182 etc.; Luchaire, *Études sur les Actes de Louis VII*, 354, 355–6, 370 (no. 26), 380–1, 394, 397, 414, 448, 462–3 etc.

<sup>6</sup> *Recueil des Actes de Louis VI*, i, 126, 181–2, 189, 192, 219, 223 etc.; Luchaire, *Études sur les Actes de Louis VII*, 355–7, 370 (no. 130), 380–1, 448 etc.

<sup>7</sup> *Recueil des Actes de Louis VI*, i, nos. 40, 46, 67, 70, 74, ii, 348, 378, 402.



contempt of the legal mandates of kings, and that the purpose of royal power was to correct the guilty where priestly words failed, so leaving religious men to pray for the peace and stability of Christian empire.<sup>8</sup> This power was early exerted to protect the independent jurisdictions of great immunists. In further acts of 1112 Louis ordered (*decrevimus et statuimus et regio edicto precipimus*), for his health and that of his successors 'and for the stability and peace of our realm', that the abbot of Saint Denis should have full power to free the serfs of the abbey and to give justice to everyone, including Jews, within the banlieu of Saint Denis; the king himself would prosecute for injuries to his majesty in the abbot's court.<sup>9</sup> Again in a privilege of 1136 for the cathedral and canons of Laon, issued out of his duty to maintain churches and clergy in 'the state and vigour of their original liberty', the king granted that a complaint against a canon should be heard by the dean and chapter; but anyone coming to Laon for the great feasts and fairs would receive a three-day protection from the king himself, royal indignation descending on those who infringed.<sup>10</sup>

In property disputes involving great abbeys the king would give judgment himself, or at least arrange and confirm a settlement by arbitration. Among many complaints decided before the king *in palatio publice* at Saint-Benoit-sur-Loire in 1112 was a complaint by the abbot of Fleury of the injuries inflicted on his church by Fulk, vicomte of the Gatinais, and his vassal Goscelin: the latter acknowledged the disputed land to be Fleury's to hold, but at an annual rent to Fulk for which it was adjudged that he might distrain the abbey.<sup>11</sup> In another case Barthelemy de Breteuil failed to appear for a hearing at Beauvais and was sentenced by the king's justice to lose the tenement he was disputing with the abbot of Bec.<sup>12</sup> In 1132 King Louis notified all his faithful people, present and to come, of an important judgment given before him by a court of prelates and barons in an appeal of false judgment brought by Alvisse, bishop of Arras, against his own episcopal court. In finding for Alvisse the king's court decided that a previous bishop should not have made a feoffment of lands belonging to his church without the assent of his chapter and of the king; and Louis pronounced the judgment henceforth to be a rule binding all churches in his realm.<sup>13</sup> On another occasion the great Abbot Suger entered the king's presence complaining (*conquerens*) of the many injuries and exactions he had

<sup>8</sup> Ibid. i, no. 67.

<sup>9</sup> Ibid. i, nos. 70, 74.

<sup>10</sup> Ibid. ii, nos. 348, 378, 402.

<sup>11</sup> Ibid. iii. 29 and i, no. 66, and cf. i, nos. 16, 95, 132, 215, ii, nos. 316, 409, and iii. 29; cf. also Luchaire, *Études sur les Actes de Louis VII*, nos. 33, 36, 365, 766 etc.

<sup>12</sup> *Recueil des Actes de Louis VI*, i. 215.

<sup>13</sup> Ibid. ii, no. 316.

suffered at the hands of Hugh 'Balverus', the advocate of Saint-Denis's manor of Laversine. Hugh had already been excommunicated, but it was necessary for the king to make a peace between the parties, the terms of which included the sharing of fines from convicted criminals: each taking half of the one hundred shillings for homicide and of the fifteen shillings for wounding. If either Suger or Hugh should depart from the agreement, the king would call the case before him at Béthisy or Compiègne where Louis and two of his ministers would answer for the settlement.<sup>14</sup>

A royal judgment of 1136 in favour of the bishop of Soissons shows two of the main factors in the growth of royal jurisdiction: the close supervision by the king over communes of his own foundation and his increasing ability to institute inquiries (*enquêtes*) before reaching a decision. Soissons townspeople testified before the king's butler that powers had been exercised which were not contained in the commune's charter, and the mayor and magistrates were made to swear in the king's presence that they would no longer take in people from the bishop's lordship who married members of the commune, nor impose fines of more than 60 shillings upon the men of outside lords without the latter's consent.<sup>15</sup> As fundamental to royal jurisdiction as the control of the great communes the roots of which lay in the eleventh-century peace movement was the fresh granting of liberties to communities on the king's demesne lands like those given to the men of his residence at Compiègne in 1111. The security of all freemen there, clergy and laity, rich and poor, was assured unless they transgressed, in which case they should expect to be judged according to the laws; only the king's servants might arrest them within five leagues of the town; lords who had men in Compiègne were instructed to settle complaints against them by fellow burgesses or by the king's servants; the redemption of cattle caught straying in the fields was regulated; the clearances of woodland 'popularly known as assarts' which the king had ordered to remain uncultivated were now permitted to be used, though no more were to be made; and those coming to market in Compiègne were told they could travel without fear. The grant of these communal privileges was at the petition of the abbot of Compiègne, and their confirmation and extension by Louis VII and Philip Augustus (1180–1226), was said to be 'for the good of peace, the benefit of the church and the security of the servants of God'.<sup>16</sup>

<sup>14</sup> *Recueil des Actes de Louis VI*, ii, no. 409.

<sup>15</sup> *Ibid.* ii, no. 380.

<sup>16</sup> *Ibid.* i, no. 54, iii, pp. 71–2; confirmation by Philip II: *Recueil des Actes de Philippe Auguste*, 4 vols., ed. H.-Fr. Delaborde, Ch. Petit-Dutaillis, J. Monicat, J. Boussard, M. Nortier (Paris, 1916–70), i, 203 (no. 169); C. Petit-Dutaillis, *Les Communes françaises* (Paris, 1947),

In the south of France and Catalonia the twelfth century saw the great lords, lay and clerical, making of the peace of God what T. N. Bisson has called a 'statutory structure' of law and order imposed from above.<sup>17</sup> In the north the extent to which the peace of God had given way to the peace of the realm appears in 1147–9 when Louis VII was away on the Second Crusade, leaving Suger as regent. Unlike the First Crusade, the Second was led by kings, in whose absence from their realms the pope showed a necessary concern for the rule of France as well as Germany. French bishops were ordered to defend the *pax regni* by excommunicating malefactors and to be more diligent in preserving 'the state of the realm' (*ad conservandum statum regni promptiores existant*).<sup>18</sup> The crusade over, Louis ordained a ten-year peace 'for the whole realm' of France at a council at Soissons in 1155, three years after Barbarossa's original *Landfriede* and eleven years before Henry II's Assize of Clarendon were issued with similar purposes. This peace, which the barons and prelates swore to observe, and the king promised to enforce 'as far as he was able', was never to be specifically renewed, for the reality behind it was the constant settlement of disputes by the king and his servants and the supervision of justice in urban communities.<sup>19</sup>

The development of the French state accelerated further at the time of the third and most spectacular of the crusades, which saw Philip Augustus and Richard the Lionheart confront Saladin and fall out with each other at the great siege of Acre. The scale of the crusading enterprise taught kings how to mobilize the resources of their countries, and the pope's authorization of the taxation even of the clergy for the purposes of the crusade made them aware of their powers. Like the Emperor Conrad in 1147 they had to make provision for the rule of their countries before they left for the Holy Land, and accordingly King Philip and King Richard of England decreed 'a firm peace' between themselves and their realms at Nonancourt on 30 December 1189. This included the provisions that their justices and bailiffs should protect the property of crusaders until their return, and that no one indulging in private war in one country should be received in the other.<sup>20</sup>

38 ff., 81 ff.; D. Kenelly, 'Medieval Towns and the Peace of God', *Medievalia et Humanistica*, 15 (1963).

<sup>17</sup> T. N. Bisson, 'The Organized Peace in Southern France and Catalonia, ca.1140—ca.1233', *American Historical Review*, 82 (1977).

<sup>18</sup> H. Hoffmann, *Gottesfriede und Treuga Dei*, Schriften der MGH 20 (Stuttgart, 1964), 117–25; A. Grabois, 'De la trêve de Dieu à la paix du roi: Étude sur les transformations du mouvement de la paix au XII<sup>e</sup> siècle', in *Mélanges offerts à René Crozet*, ed. P. Gallais et Y.-J. Riou (Poitiers, 1966), i. 591–3; Mansi, *Concilia*, xxi, col. 717.

<sup>19</sup> Mansi, *Concilia*, xxi, cols. 837–8; *Recueil des historiens des Gaules et de la France*, xiv. 387.

<sup>20</sup> *La France de Philippe Auguste: Le Temps des mutations*, ed. R.-H. Bautier (Paris: Centre

Before his departure in June 1190, Philip issued for France a document which was partly the last will and testament of a king who might die in the Holy Land, partly a general ordinance of immense significance. It was the duty of kings (*officium regium*) to provide for the needs of their subjects, it declared. The first of the instructions for the conduct of the realm's affairs in the king's absence was that in every *prévôté* the royal bailiffs should appoint four lawful and prudent men to aid the king's provost in the management of the royal domain, except that in Paris there should be six. The bailiffs themselves must set aside a day a month as an assize day, when they should give justice without delay to complainants and the king also should have his rights enforced. Except in cases of homicide, rape, and treachery the bailiffs and provosts were not to keep in custody anyone who gave pledges that they would answer pleas against them in a royal court. Three times in the year the queen mother and the archbishop of Rheims, the king's uncle, should sit as a final court of appeal in Paris and hear *clamores* from the whole kingdom. The regents should also oversee vacancies in bishoprics and royal abbacies, and if Philip should die on crusade, divide the royal treasure, using half of it to pay the king's debts and repair churches destroyed in his wars and leaving the other half in the custody of the Paris merchants until his son was of an age to rule; if his son died too the royal goods should be collected together in the house of the bishop of Paris and dispensed for the benefit of the souls of king and prince.<sup>21</sup>

The importance of the ordinance rested above all in its articulation of local and central administration. The revenues of the king were to be brought, also three times a year, to the Temple treasury in Paris, where Adam the clerk would record their receipt and payments from them would be made only on the king's written authority. But the judicial procedures laid down were more fundamental than the fiscal machinery. 'The bailiffs who hear assizes in the towns of the kingdom' must attend the thrice-yearly courts of the queen-mother and archbishop to have the business of the kingdom recited to them and to report on the shortcomings of the *prévôts*. During the king's absence neither *prévôts* nor bailiffs might be removed, except for homicide, rape, or treason, but the bailiffs' acceptance of rewards and services from the parties to litigation, which deprived both king and subjects of their rights, must be reported to Philip, so that under God's guidance he could devise suitable punishment. The ordinance's key requirement follows the judicial clauses: the

National de la Recherche Scientifique, 1982), 20-1, 411-24; J. W. Baldwin, *The Government of Philip Augustus: Foundations of French Royal Power in the Middle Ages* (Berkeley: California UP, 1986), 52-4, 77-80; *Recueil des Actes de Philippe Auguste*, i, nos. 287, 289.

<sup>21</sup> *Recueil des Actes de Philippe Auguste*, i, no. 345; Baldwin, *Government of Philip Augustus*, 101-2, 406.

queen and archbishop must inform King Philip three times a year 'of the state of our kingdom and affairs' (*de statu regni nostri et negotiis*).<sup>22</sup>

The crusading ordinance of 1190 shows that the means of governing a wider kingdom were being developed well before the conquest of Normandy and other Angevin lands which began in 1204 and the annexation of Languedoc by Louis VIII in 1226: the acquisition of these vast territories, different in culture and institutions from the old Capetian domains and from each other, simply emphasized the need for a new concept of the realm to be governed.<sup>23</sup> The city of Paris, though it was never allowed the freedoms of a commune, was already becoming a true capital by reason of its commerce, its use by the crown as a source of administrative expertise as well as money, and the evolution of its schools into a university.<sup>24</sup> Elsewhere Philip harnessed communal energies on a new scale. His first expansion of the realm towards the north-east at the expense of the count of Flanders was marked by the creation or confirmation of communes at Amiens, Arras, Tournai, and a dozen other places, the conquest of Normandy and Poitou by the licensing of communes at Rouen, Caen, Falaise, and Poitiers amongst other towns.<sup>25</sup> Grants to townsmen had early allowed him to intervene in the archbishop's Rheims and the duke of Burgundy's Dijon.<sup>26</sup>

Control of the communes was so important to the king that immediately after the conquest of Normandy the charters of thirty-nine of them were copied out by a royal clerk to form 'the only coherent section' of the first register of documents issued by the French royal chancery.<sup>27</sup> For what King Philip called 'my communes' the age of fierce independence was long past. The granting of 'peace and a commune' (*institucionem pacis et communie*) was occasionally extended beyond well-established towns to groups of rural communities, but the privileges of the commune established at Chambly by its count were confirmed by Philip explicitly without *communia et banleuga*, and there were frequent grants of lesser 'customs' to townships.<sup>28</sup> The part of the towns in the

<sup>22</sup> *Recueil des Actes de Philippe Auguste*, i, 418.13; Baldwin, *Government of Philip Augustus*, 137-9.

<sup>23</sup> C. T. Wood, 'Regnum Francie', *Traditio*, 23 (1967); J. R. Strayer, 'Normandy and Languedoc', *Speculum*, 44 (1969).

<sup>24</sup> *La France de Philippe Auguste*, 21-6; Baldwin, *Government of Philip Augustus*, 326.

<sup>25</sup> *Recueil des Actes de Philippe Auguste*, i, nos. 35 (Soissons), 224 (Tournai), 319 (Amiens), 473 (Arras), ii, nos. 491 (Saint-Quentin), 540 (Roye), 706 (Senlis), 790 (Falaise), 858 (Poitiers); iii, nos. 977 (Péronne), 1000 (Rouen), 1117 (Bray-sur-Somme), 1389 (Crépy-en-Valois); *Les Registres de Philippe Auguste*, ed. J. W. Baldwin, *Recueil des historiens de la France: Documents financiers et administratifs*, 7, i (Paris, 1992), 558-64, 600 (map); Baldwin, *Government of Philip Augustus*, 60-3.

<sup>26</sup> *Recueil des Actes de Philippe Auguste*, i, nos. 73, 101.

<sup>27</sup> *Registres de Philippe Auguste*, i, 335-8; Petit-Dutaillis, *Les Communes françaises*, 20, 286-7; Baldwin, *Government of Philip Augustus*, 412-13.

<sup>28</sup> L. Carolus-Barré, 'Philippe Auguste et les villes de commune', in *La France de Philippe*

growth of royal government is clear in both England and France. In 1200 the burgesses of Lincoln obtained from King John the right to have two of their number appointed the king's reeves (*prepositi*) in the town.<sup>29</sup> In 1201–2 the people of Mantes were granted the *prepositura* of the commune, which meant that the mayor acted as the king's *prévôt* and became responsible for collecting royal revenues from the locality, 'by land and by water'; at the same time the commune was granted 'all our justice' there, except that the king retained cases of murder and rape, and the right to take customs duties in war and in peace.<sup>30</sup>

The towns were central to the king's fiscal arrangements: it was through their courts, however, that they were fitted into the scheme of royal government. When he granted or confirmed a commune, King Philip spelt out in detail how its judicial privileges should be exercised in future. By his grant to Amiens in 1190, the king's *prévôt* was to share authority with the mayor. He was to hold the persons and goods of thieves while the commune decided their fate, and king and commune should divide between them the fines imposed (cc. 2, 4, 5). The typical communal sanction of the pulling-down of the offenders' houses was authorized against any who fled before the summons of the mayor, judges, and officers of the commune, harboured its enemies, or defied its bye-laws, and again they were to be in the mercy of both provost and mayor (15, 16, 18). The mayor alone might, or rather must, give justice to complainants in accordance with the town's statutes if the provost would not, but 'saving the king's rights' (31). Abusing the provost, in court or out, would incur a penalty assessed by the mayor and aldermen; abusing the mayor or town officers while on municipal business (calling them serfs or throwing them into the bog) would be punished as laid down in the commune's statutes (37–42). It seems to have been for the provost, as essentially the royal landlord's estate-manager, to hear disputes over landholding in the town at a *placitum generale* held every Christmas, Easter, and Pentecost (47). To the mayor and the *scabini* was reserved the judging of offences against the peace, but 'in the presence of our bailiff if he wishes to be there': if he did not, they were still to do justice except in cases of murder and rape, for these, with the chattels of killers, arsonists, and traitors, belonged to the king in perpetuity (48–9).<sup>31</sup>

*Auguste*, 677–9, 683–5, 687–8; *Recueil des Actes de Philippe Auguste*, i, nos. 208, 272, ii, nos. 529–32, 642, 716, 718 etc.; *ibid.* i. 369 (Laon) and ii. 616 (Étampes) for examples of the royal suppression of communes; *Registres de Philippe Auguste*, i. 558–64 for Philip's taking of hostages from Flemish towns as a guarantee of their fidelity, those from Ghent being placed in the custody of the communes of Arras, Hesdin, and Saint-Omer.

<sup>29</sup> A. Harding, *England in the Thirteenth Century* (Cambridge UP, 1993), 133.

<sup>30</sup> *Recueil des Actes de Philippe Auguste*, ii, no. 694.

<sup>31</sup> *Ibid.* i, no. 319.

But Philip's vast acquisitions of territory could not be treated as mere extensions of the royal demesne lands and administered by *prévôts* alone. Like every great lord, the French king had ubiquitous bailiffs, and orders to ensure justice to churches which had been granted special protection were directed increasingly to 'all his provosts, serjeants, and bailiffs', less and less to provosts alone. While the latter were burgesses administering particular towns and their hinterlands, the *ballivi domini regis* were usually knights who worked anywhere in the domains and often in teams, though the responsibilities given to them in the ordinance of 1290 may have begun to attach them to specific bailiwicks.<sup>32</sup> Thus in 1191 Philip chided the bailiffs and provost of Étampes for their denial of justice to a house of canons, telling them they had been expressly appointed to safeguard the rights of the churches in their *ballivia*.<sup>33</sup> Still, the first *bailliages* seem to have been known by the names of their *baillis*, rather than *vice versa*.<sup>34</sup>

The conquests of 1204 stimulated the further growth of the *bailli's* office. Not only were there new territories to be ruled, but in Normandy, reserved by Philip *ad opus nostrum*, there was the example of ducal *baillis* to draw upon. From their appearance in the mid-twelfth century these had quickly acquired importance within Henry II's more elaborate system of administration.<sup>35</sup> After the conquest, King Philip ordered 'all his bailiffs and provosts throughout Normandy' to maintain 'within their jurisdictions' (*in potestatibus vestris*) the rights of monasteries and of the Knights Templar, as they had been enjoyed in the times of Henry and Richard, kings of England, and to do justice on usurers at the request of Norman bishops.<sup>36</sup> The extension to the French king's older dominions of the stringent control of Jewish activities begun by the Angevin dukes culminated in an ordinance, addressed to 'all the bailiffs appointed throughout France and Normandy', which required each township to keep a seal for the authentication of agreements between Jews and Christians.<sup>37</sup> Similar innovations in the Capetian domains and in Normandy reinforced each other to give the

<sup>32</sup> Bautier, introduction to *La France de Philippe Auguste*, 19; Baldwin, *Government of Philip Augustus*, 125–35, 428–33; 'Chronologie des baillis et des sénéchaux royaux depuis les origines jusqu'à l'avènement de Philippe de Valois', in *Recueil des historiens des Gaules et de la France*, xxiv: *Les Enquêtes Administratives du Règne de Saint Louis*, ed. L. Delisle (Paris, 1904), préface and 'preuves de la préface', pp. \*15–\*385; *Recueil des Actes de Philippe Auguste*, i. 184.11, 194.20 (provost alone), 562.1, ii. 57.21, 76.16 (provosts, serjeants, and bailiffs), 116.18, 178.4, 212.10, 294.21 (*universis baillivis suis*), 384.1 (*universis amicis et ballivis suis*) etc.

<sup>33</sup> *Recueil des Actes de Philippe Auguste*, i, no. 385.

<sup>34</sup> Ibid. i. 345; Baldwin, *Government of Philip Augustus*, 128.

<sup>35</sup> C. H. Haskins, *Norman Institutions* (New York, 1918), 105, 151–2; Baldwin, *Government of Philip Augustus*, 224–5.

<sup>36</sup> *Recueil des Actes de Philippe Auguste*, ii, nos. 872–4.

<sup>37</sup> Ibid. iii, no. 1555.

spread of royal administration an irresistible impetus at the expense of feudal lordship. The fiefs held from the king that were subjected to a comprehensive survey in 1220 were grouped in the record into eight *bailliages* in Normandy (Gisors, Verneuil, Rouen, Caux, Caen, Bayeux, Avranches, and Cotentin) and four in the old Capetian lands (Vermandois, Sens, Étampes, and Bourges).<sup>38</sup> Below the *baillis*, temporary, not hereditary, castellans were being appointed for royal castles, and alongside the *prévôts* town mayors who were essentially farmers of the king's taxes.<sup>39</sup> The supervision of the Capetian *prévôts* had originally been by the seneschal or steward, the chief minister of the king's as of every great feudatory's household. The royal seneschal from 1154, Count Thibaut of Blois, died in 1191 on the Third Crusade and was not replaced.<sup>40</sup> King John's seneschal for Normandy was kept on by King Philip for a brief period in 1204, but then the office disappears there as well.<sup>41</sup> A series of inquests made possible by the existence of newly professional servants at the central and the local level took stock of the feudal situation in Normandy and subjected it to the king's will.<sup>42</sup>

Along the Loire and southward, the main governmental resource of the king of France remained the stewards of the fiefs which now looked directly to him as lord. In Anjou, including Maine and Touraine, which controlled vital routes to the south, William des Roches was hereditary seneschal by the grant in 1199 of Prince Arthur, King John's nephew and rival, which King Philip had gladly confirmed. But William was instructed to hand over any castles in Anjou to which the king should wish to appoint his own castellans. Though hereditary, the seneschalcy was entirely within the king's power to define. Making provision for the defence of the Loire region against King John in January 1207, Philip took away from des Roches Touraine and its seneschalcy, the provostships and seneschalcies of Chinon, Bourgueil, and Loudon, and the provostship of Saumur, and from this time men who have the look of professional administrators appear as *baillis* or *sénéchaux* of Touraine and Poitou.<sup>43</sup>

Though the territorial marking-out of *bailliages* and *sénéchaussées* was dictated by the requirements of tax-collecting, it was essentially as agents of royal justice that the corps of *baillis* extended the king's authority throughout France. The teams of two or more *ballivi domini*

<sup>38</sup> Baldwin, *Government of Philip Augustus*, 292 ff.

<sup>39</sup> Ibid. 301.

<sup>40</sup> Ibid. 31–2, 55, 80, 104, 465 n.29.

<sup>41</sup> Ibid. 221.

<sup>42</sup> *Les Registres de Philippe Auguste*, 54 ff.; Baldwin, *Government of Philip Augustus*, 249, 289 ff.

<sup>43</sup> Baldwin, *Government of Philip Augustus*, 233 ff.; *Recueil des Actes de Philippe Auguste*, ii, nos. 608, 829, 838, 948, 963.



*regis* who operated within the Capetian demesne had something in common with the justices which Henry II began to send 'on eyre' in England in 1166, but the *bailli* also had a role like the English sheriff's in bringing royal justice to the local community all the time. Kings could not peremptorily take the adjudication of the landed disputes of under-tenants away from the courts of the disputants' lords. Through his bailiffs the French king could, however, bring down to the local level the offer of effective inquiry and arbitration. Episcopal and monastic cartularies record the vindication of church property at assizes presided over by royal bailiffs: how often assizes were used when both parties were laymen we cannot know. At assizes property rights are reported as sold, quitclaimed or acknowledged in the presence of a *ballivus domini regis*, or two or three bailiffs, who then notify the result of the hearing by a charter with a general address (*notum facio universis tam presentibus quam futuris*).<sup>44</sup> Sometimes the royal bailiffs appear to be no more than the presidents of a gathering of the lords of a region to which the results of arbitrations are reported; it is at the request of litigants that bailiffs add their seals to documents.<sup>45</sup> But bailiffs themselves may arbitrate, and when the notification of the settlement cites evidence, it reads like a judgment. A charter drawn up at a gathering in a church at Sées in 1212 was read out for approval before the bishop of Sées, a royal bailiff, and a company of knights and clergy there present and holding the assizes.<sup>46</sup> At Laon in 1217 three 'bailiffs of the lord king', along with the provost of Laon and a parish priest, received and announced 'at the prayer of the parties' the result of an inquest by the oaths of forty men of the district concerning the rights of the abbey of Saint-Médard in four villages; after taking counsel from learned men they affirmed the finding 'saving the right and customs of the king'.<sup>47</sup> Official records of the assizes do not survive, any more than they do of proceedings in the English shire court, but they seem to have existed. The cartulary of Saint-Martin de Sées describes the making of a grant which 'was written in the rolls of the assizes of the lord king for its greater assurance (*firmi-tatem*)'.<sup>48</sup> The whole development of royal justice depended on the strength of its local base in the *ballivi domini regis* and their serjeants: it was their actions which enabled the king's court in France to provide a judicial service comparable to that of the English *curia regis*, without the formalism of the writ.

Under Philip Augustus royal notification of accords reached with the

<sup>44</sup> *Recueil des historiens*, 24, pp. \*271-293: 'Preuves de la préface', nos. 3, 5-7, 12, 19, 20, 26, 28-31, 34, 41, 44, 49, 52, 53, 57, 59, 61, 65, 67, 76, 84, 85 etc.

<sup>45</sup> e.g. 'Preuves de la préface', nos. 49, 52, 57, 59, 65, 67, 84.

<sup>46</sup> *Ibid.* no. 30 (p. 278\*).

<sup>47</sup> *Ibid.* no. 44 (p. 282\*).

<sup>48</sup> *Ibid.* no. 53 (p. 284\*).

king's personal assistance became common form. Just as he had long confirmed grants of land, so at the request of the parties he would confirm the peace made between them to conclude an ancient *querela*, *controversia*, or *contentio* or even *bellum*. A controversy would be 'settled in [the king's] presence in this way', or Philip would announce the terms of agreement proposed after arbitration 'in our court'.<sup>49</sup> 'At the petition of the parties' the king gave his personal guarantee in 1213 (*garantizaturam promissimus et manucepimus*) for a quitclaim to the chapter of Chartres of the rights of *voirie* on its lands which had been made by Hervé and Galeran de Gallardon after 'mediation by good men'.<sup>50</sup> The result of a case in the same year between the *fidelis* Roger de Rozoy and the monks of Signy about the advocacy of the monastery was that Roger surrendered it into the king's hands, and Philip pledged himself in perpetuity to give the monks justice against malefactors.<sup>51</sup> An accord confirmed by the king between the abbey of Saint-Germain des Prés and the lord of Nogent about shares in a wood looks to have superseded a sentence by papal judges-delegate.<sup>52</sup>

Thrice-yearly sessions of the *curia regis* under the edict of 1190 were always intended to lapse on the king's return, but settlements of disputes before the king began to take on the appearance of judgments in a supreme law-court, particularly when they followed preliminary proceedings conducted by *baillis*, *officiales domini regis*, *justiciarii*, or *assessores*.<sup>53</sup> The settlement confirmed by the king in 1186 between a monastery and the count of Dammartin, which involved the inspection of charters from previous kings, could already be described as 'a definitive sentence and judgment of our court'.<sup>54</sup> In 1189 Philip 'decreed the end' of a dispute between the canons of Étampes and the church of *Sainte-Croix*, since it 'pertained to his office to restore peace and, as the promoter of justice, give everyone his due'. Soon afterwards the king committed the termination of a continuing dispute between the two churches over the saying of masses, the visitation of the sick, baptisms and the purification of women etc., as these were ecclesiastical matters, to the bishop and chapter of Paris, but it was emphasized that they acted as 'judges at our command' (*judices ex mandato nostro*); and when a decision was given for the canons, the bailiffs and provost of Étampes were ordered to enforce it under threat of heavy punishment, since they

<sup>49</sup> *Recueil des Actes de Philippe Auguste*, i, nos. 18, 212, 277, 357, 366, 384, ii, nos. 619, 639, 643, 683, 784, iii, nos. 1101, 1108, 1114, 1121, 1175, 1189, 1190, 1199, 1228, 1243, 1293, 1359, iv, 1420, 1440, 1606, 1629, 1630, 1744, 1770, 1800 etc.

<sup>50</sup> *Ibid.* iii, no. 1278.

<sup>51</sup> *Ibid.* iii, no. 1303.

<sup>52</sup> *Ibid.* iii, no. 1243.

<sup>53</sup> *Ibid.* i, nos. 273, 384-5, 525, 597, 603, 622, 666 etc.; Baldwin, *Government of Philip Augustus*, 41-2, 102, 111-12, 127, 140-4, 416-17.

<sup>54</sup> *Recueil des Actes de Philippe Auguste*, i, no. 179.

had been appointed by the king to protect the rights of churches and the poor.<sup>55</sup> The king's writing (*scriptum*) communicated in 1196 the judgment of his court (*judicium curie nostre*) that the free tenants of the cathedral of Noyon, not the *scabini* of the town, should decide suits between bishop and burgesses.<sup>56</sup> Asked in 1199 to arbitrate between Pierre de Courtenay and Hervé de Gien, Philip pronounced a detailed *dictum*: 'for the sake of good peace and the advantage of the land' Peter should hold his property at Tonnerre and Auxerre as long as he lived, but after his death it should all go to Harvey and his wife Matilda (who was Peter's daughter) and their heirs. Peter and his heirs should continue to hold the castle of Mailly *jure hereditario*, however, along with any new lands he acquired, while another property should go to Harvey since it was surrounded by his land.<sup>57</sup>

With increasing frequency judgments were given after testimony by sworn jurors assembled by *baillis* or other royal officials. In 1190 Philip, king of the French, and Richard, count of Anjou and about to become king of the English, held an inquest to discover from a jury of the more honest clerks and burgesses of Tours the respective rights which Richard and the chapter of Saint-Martin of Tours enjoyed in Touraine, as the jury had seen their exercise or heard of it from ancestors.<sup>58</sup> At Compiègne in 1200 the king ascertained to whom rights of advocacy belonged from a jury of lawful men which he had ordered to be assembled at the request of the parties.<sup>59</sup> A year or so later Philip notified his appointment of his *bailli* Guillaume de la Chapelle to inquire as to 'who had the greater right' in a dispute about an elm tree between the abbey of Saint-Denis, the church of Saint-Aignan, and Gaucher de Joigny; a jury of men of the country specified not to be tenants of any of the parties found for Saint-Denis.<sup>60</sup> The Registers of royal government which began to be compiled in 1204, probably under the stimulus of the conquest of Normandy, contain many inquisitions into royal rights, particularly in the forests, which inevitably involved judgments on the rights of the king's subjects. Records of a few acts before 1204 were entered, such as an inquest of about 1201-2 on the respective rights of the king and the lord of Montfort in the forest of Yveline near Rambouillet: in this case the jury was composed of seventeen 'knights and servants' of Philip along with fourteen of Montfort's.<sup>61</sup> The use of the sworn inquest was especially fostered by the need

<sup>55</sup> *Recueil des Actes de Philippe Auguste*, i, nos. 273, 384-5.

<sup>56</sup> *Ibid.* ii, no. 525.

<sup>57</sup> *Ibid.* ii, no. 619.

<sup>58</sup> *Ibid.* i, no. 361.

<sup>59</sup> *Ibid.* ii, no. 641.

<sup>60</sup> *Ibid.* ii. 689.

<sup>61</sup> *Les Registres de Philippe Auguste*, 50-2 (no. 7).

to establish the historic rights of the dukes of Normandy which should have passed in 1204 to the French king. At Évreux a jury composed of four knights, three burgesses 'of the lord king', four burgesses of the bishop, and four burgesses of the abbot was called upon to determine the burden of fortifying the town and remembered what had been done at the time of the imprisonment of King Richard in Germany, when Adam the Englishman was mayor.<sup>62</sup>

That inquest was called a 'recognition', the same term as that for a verdict in an English plea of land, and the more formal Anglo-Norman procedures are likely to have influenced French justice in some degree. At assizes (in the plural) held in 1205 'in the court of the lord king of France' at Sées by the *bailli*, Nicholas Bocel, the bishop, and many other lords, there was a *recognitio* concerning land which the demandant said was his inheritance and only mortgaged to the sitting tenant 'since the coronation of the lord Henry, king of England'. In what almost seems an amalgam of Anglo-Norman and French practice a jury of twelve men found that on the contrary the land had been conveyed in due form, the parties made peace by the mediation of friends, judgment was given for the tenant, and the demandant was declared 'in mercy for a false claim'.<sup>63</sup> A cartulary preserves a copy of a letter from a Norman *bailli* certifying the result of a jury-trial, which was ordered (on the English model?) by the king's writ (*per mandatum domini regis*) so that controversy on the matter would cease for ever.<sup>64</sup> After 1204 judgments continued to be given by the barons of Normandy in the ducal exchequer at Rouen, Falaise, or Caen and recorded on rolls which had been kept from King Richard's time (when the plea rolls of the English *curia regis* also began) and now ran in King Philip's name.<sup>65</sup>

At most, however, Anglo-Norman influences added to the momentum with which the French king's justice went on growing through the royal ordering of inquests or judicial duels before *baillis*, the seneschal of Anjou, or sometimes even a prelate, and the reporting back of the resulting *judicia* to the king for confirmation.<sup>66</sup> In 1220 even Hubert de Burgh, the justiciar of England, received a mandate from King Philip to

<sup>62</sup> *Les Registres de Philippe Auguste*, 59–61 (no. 15), 67–8 (no. 22).

<sup>63</sup> *Recueil des historiens*, 24, pp. \*272–\*273, preuve no. 10, and cf. nos. 11, 13, 27; Haskins, *Norman Institutions*, 163–8, 186–7; Baldwin, *Government of Philip Augustus*, 220–30, 589.

<sup>64</sup> *Recueil des historiens*, 24, p. \*277, preuve no. 30.

<sup>65</sup> *Les Registres de Philippe Auguste*, 56–9 (no. 14), 87–8 (no. 41); Baldwin, *Government of Philip Augustus*, 418–20; J. R. Strayer, *The Administration of Normandy under Saint Louis* (Cambridge, Mass., 1932), 17–18.

<sup>66</sup> *Recueil des Actes de Philippe Auguste*, iii, nos. 1214, 1238, 1286, 1298, 1300, 1370, 1420, 1415, 1465, 1500, 1606, 1635, 1674, 1689; *Recueil des historiens*, 24, pp. \*274, \*279, \*287 (preuves, nos. 15–17, 35, 65, 66); *La France de Philippe Auguste*, 18; Baldwin, *Government of Philip Augustus*, 258.

see that restitution was made to the men of Calais, whose ships were being held to ransom at Sandwich, Dover, and elsewhere, as he would wish to see justice done to Englishmen in a similar situation in France.<sup>67</sup>

## STABLIMENTA

The king's role in the machinery of justice was to use his political authority to give a grant or judgment 'the strength of perpetual stability' (*perpetue stabilitatis robur*), a formula found in charters throughout the Frankish world.<sup>68</sup> When important political figures or a whole class of tenants were involved, such promulgation of decisions about feudal rights amounted to legislation. Since both parties held of King Philip's fee, King Richard Coeur de Lion's agreement with the archbishop of Tours in 1190 concerning the exercise of justice in Touraine received the formal approval of the French king, who 'rejoiced in peace and wished to preserve their rights whole and unimpaired'.<sup>69</sup> The name sometimes given to such an affirmation of rights was *stabilimentum* (*établissement*, statute). It was the term applied in Philip's register to the declaration of the barons of Normandy of the rights they had seen King Henry (II) and King Richard exercise with respect to the clergy, which was made on oath at Rouen in 1205 and recorded in a document with twenty-two seals.<sup>70</sup> Another inquest taken towards the end of Philip's reign by three of the most experienced royal *baillis* again shows feudal tenure being regarded as a set of legal rights to be declared by the barons, but very much at the direction of the king and his judges. The *baillis* reported to Philip that they had gone to Montdidier as he ordered and had required of the king's men and knights of the castellany, 'by the fees and loyalties binding them to you', that they would pronounce a judgment on Jean de Preaux's obligation to give his uncles a share of his inheritance. The knights had replied that they would not give a judgment but only say what the practice (*usus*) was in such situations when the count of Flanders was overlord there; and since they would not declare this as a judgment, the *baillis* had seized the recalcitrant knights' goods and now awaited the king's orders.<sup>71</sup> In 1224, Louis VIII instructed two *fideles* to compel men named by the abbot of Saint-Victor as his vassals to do homage to him for their fees, as they ought to do according to the *stabilimentum feodorum* made by the king's

<sup>67</sup> *Recueil des Actes de Philippe Auguste*, iv, no. 1674.

<sup>68</sup> *Ibid.* i, no. 357, iii. 1678 etc.

<sup>69</sup> *Ibid.* i. 357.

<sup>70</sup> *Les Registres de Philippe Auguste*, 56 (no. 14).

<sup>71</sup> *Ibid.* 118–19 (no. 72).

father, King Philip, by the common assent and will of the barons of France.<sup>72</sup>

When the status of a group of persons has to be settled, the language of the statute seems to gain in royal letters at the expense of the language of the grant. At Pont-de-l'Arche in 1219 Philip declared concerning married persons (*statuit de viro et muliere matrimonio conjunctis*) that the relatives of a wife who died childless before her husband should have no right to the property he had acquired.<sup>73</sup> The notification of procedures for controlling the Jews' money-lending activities which Philip sent out in 1206 was called a *stabilimentum*, and it was renewed with the assent of leading barons in 1219 and again by Louis VIII.<sup>74</sup>

Legal order was established most obviously by inquests and judgments which demarcated between king, clergy, lay barons, and communes the rights to exercise justice in specific localities. The king's right to punish offences in the forests was determined 'by lawful inquest'.<sup>75</sup> The rights of *voirie* of Simon de Valcontart were decided by a 'jury' of fifteen *milites* (actually including a *presbiter*), and found to be limited to the receipt of a third of the fines from justice exercised by the king or his *bailli*.<sup>76</sup> Thirteen 'knights' (one an abbot, another a draper) allotted rights between the lords of the castles of Évreux and Gaillon; concerning justice they decided that all cases leading to trial by battle or penalties of life or limb belonged to Évreux.<sup>77</sup> Rights of justice at the castle of Vernon were determined by a jury of nine knights, four priests, and twenty-four burgesses, who said that the lord of Vernon was accustomed to hold judicial duels and trials of 'resident' thieves—to hear all pleas, indeed, except pleas of the sword and recognitions [by jury], which were the duke of Normandy's prerogative; free tenants of the lord of Vernon were likewise entitled to hear the pleas of their men, but excluding the cases settled by duel, from which they kept only the fines that were imposed.<sup>78</sup> Granting a commune to Roye in 1196, Philip set down when 'our justice' should be exercised by mayor and *scabini* and when by royal judges, but inquests were necessary years later to confirm that the king had exercised judicial rights there on specific occasions.<sup>79</sup>

<sup>72</sup> F. Gasparri, 'Trois actes royaux originaux des XII<sup>e</sup> et XIII<sup>e</sup> siècles', *Bibliothèque de l'École des Chartes*, 138 (1980), 90–3.

<sup>73</sup> *Ordonnances des Roys de France de la Troisième Race*, i, 38.

<sup>74</sup> *Ibid.* i, 44; Baldwin, *Government of Philip Augustus*, 231.

<sup>75</sup> *Recueil des Actes de Philippe Auguste*, ii, no. 540, iii, 1261, 1628; *Les Registres de Philippe Auguste*, 78–80, 95–8, 105–9, 119–22, 133–4, 138–40, 147–51, 165 etc.

<sup>76</sup> *Les Registres de Philippe Auguste*, 139–40 (no. 84).

<sup>77</sup> *Ibid.* 95–6 (no. 47).

<sup>78</sup> *Ibid.* 133–4 (no. 81).

<sup>79</sup> *Recueil des Actes de Philippe Auguste*, ii, no. 540; *Les Registres de Philippe Auguste*, 147–9 (nos. 89–90).

A king whose predecessors had granted the liberties of the clergy would naturally claim to determine their extent and even represent them as exercised on his behalf. Philip granted the abbot of Nant the right to exercise justice 'by our authority' in his lands, in order to 'purge them of wicked men'.<sup>80</sup> He confirmed an agreement between the bishop and chapter of le Mans and the lord of Outille, reached after an inquest summoned by the seneschal of Anjou, which restricted the lay lord's right to exercise criminal justice within the chapter's lands; and another made after an inquest of knights and servants assembled by the parties before the bailli of Tours, which excluded the lord of Loches from trying murder, rape, or arson, or exercising any justice great or small, in the lands of Saint-Martin at Ligueil.<sup>81</sup>

The over-arching justice of the king appeared more or less clearly in all these settlements. In 1190 Philip stood firmly behind the chapter of Tours in the establishment of its rights over against the count of Anjou to exercise justice on its lands, and pledged his authority that the agreement which was reached should never be used to undermine the 'due state' of the church of Saint-Martin according to the privileges granted by his predecessors.<sup>82</sup> Three decades later, inquests recorded in the royal registers affirmed the king's right to exercise high justice in the lands of the bishops of Paris and Arras; at Paris a number of jurors testified individually to seeing cases of murder and rape punished there by the king's officers.<sup>83</sup> Another inquest of knights and burgesses, held in 1221 'lest the rights of the king should in any way perish', asserted his right to judge cases brought to him because of default of justice in the feudal court of the bishop of Laon, and assigned decisions that there had been default of justice in secular matters (i.e. not usury or marriage or other spiritual pleas) to juries of laymen assembled by royal bailiffs.<sup>84</sup> In the same year the jurors who determined the rights of the king in the *prévôté* of Orleans said that the bishop could not arrest Jews under the king's protection, and that they had never seen people stopped from selling food to *prévôts* who had been excommunicated by the Church; they listed cases they had seen of clergy degraded by the bishop for murder and theft and handed over for punishment at the king's will (for theft, by having their eyes put out); and they described examples from the time of bishop Manasse when a man condemned in the church court for denying the faith (*pro incredulitate*), and a woman condemned for carrying a milking-pail marked with the cross of the

<sup>80</sup> *Recueil des Actes de Philippe Auguste*, i, no. 415.

<sup>81</sup> *Ibid.* iii. 1286, 1300, 1415.

<sup>82</sup> *Ibid.* i, no. 361 (p. 444).

<sup>83</sup> *Les Registres de Philippe Auguste*, 161-3 (no. 100), 167-8 (no. 106).

<sup>84</sup> *Ibid.* 154-5 (no. 95).

Albigensian heretics, were surrendered to the king to suffer 'secular justice by fire'.<sup>85</sup>

The king's establishment of an exclusive jurisdiction over serious crime was accompanied by edicts distinguishing between cases appropriate to royal courts and those belonging to courts Christian across a wider spectrum. In this France was following England, where the Assize of Clarendon of 1166 which provided for the indictment of serious criminals had been preceded two years earlier by the Constitutions of Clarendon proclaiming the supremacy of the king's court in all matters of feudal landholding, including disputes about landlords' presentations of clergy to their livings, along with the ultimate power of the king to punish criminous clerks once they had been degraded. A clear separation of the two jurisdictions in both England and France was impeded less by the resistance of bishops like Thomas Becket than by the complex inter-reliance of secular and ecclesiastical administration. The king's ministers sometimes called in aid the church's power of excommunication against peace-breakers (though they resented its being turned against themselves), while churchmen looked to the king for the force to make an obdurate excommunicate submit to ecclesiastical discipline. Moreover, the seasoned administrators who framed the royal judgments which gradually replaced agreements and arbitration awards were often churchmen; and it is not surprising that the abbot of Bèze opted for the king's court when forced to choose between appeal to the pope or to the king in his dispute with the bishop of Langres.<sup>86</sup>

Here above all there was a need and an opportunity for the king to bring order to the whole administration of justice. The seneschal of Anjou and *prévôts* and bailiffs generally were ordered to ensure swift justice to the clergy but not to hear complaints which belonged to the church courts.<sup>87</sup> All mayors and officers of communes were forbidden to arrest anyone who was manifestly a clerk—unless it was for the serious crimes of murder, homicide, adultery, rape, or the shedding of blood by means of a club, stone, or sharp instrument, or for being found 'out of hours' in a house he had been prohibited from entering; someone arrested for one of these offences should be surrendered to the ecclesiastical judge to be sentenced 'according to the quantity and quality of his offence', and if the arrest was by night he should be held apart from thieves 'in decent custody' until he could be handed over.<sup>88</sup> The sense here that the king supervised a single system of justice which included the church courts was already suggested by the charter granted

<sup>85</sup> *Les Registres de Philippe Auguste*, 158–60 (no. 98).

<sup>86</sup> Baldwin, *Government of Philip Augustus*, 41–2, 115–18, 315–28; *Recueil des Actes de Philippe Auguste*, iii, no. 1256.

<sup>87</sup> *Ibid.* iii. 1092, 1219, 1635, 1765

<sup>88</sup> *Ordonnances des Roys de France*, i. 43.



to the commune of Roye in 1196, c. 38 of which stipulated that a burgess should not be made to answer outside the town for an ecclesiastical offence, but only before the dean and chapter of Roye.<sup>89</sup> An inquest of 1210 entered in Philip's Registers found that at Amiens a complaint of injuries inflicted on a feast day should be addressed first of all to the mayor rather than the bishop.<sup>90</sup>

The most far-reaching legislation of Philip's reign after the crusading ordinance of 1190 was 'a *stabilimentum* made at Paris between the clergy and the barons' about the patronage of churches, which was probably drawn up during the winter of 1205/6 and on the model of another *stabilimentum* made on 13 November 1205 between the clergy and barons of Normandy. The Norman barons were concerned to preserve the rights of the king and themselves as they had seen them exercised under the Angevin kings: disputes had been, and should be, settled by recognitions in the king's court when they were about the patronage of livings and whether the lands of particular clergy were held for feudal service or 'in free alms'. Criminal jurisdiction appeared in the Norman *stabilimentum* only in the statements that complaints of wounding within the truce of God were also for the king, and that a clerk degraded for theft or homicide must abjure the realm and be punished like a layman if he returned and offended again.<sup>91</sup>

The Paris *stabilimentum* closed off ecclesiastical jurisdiction on a wider front than its Norman model, and is indeed presented as a series of responses to articles proposed by the king 'against the clergy'. The latter were accused of deciding feudal pleas in court Christian, saying that they were issues of good faith (*fiducie*) or of sworn undertakings, so that lords lost their courts: as to this the king and the barons agreed that clerks should try cases of perjury and breach of faith, along with the appeals of widows for their dower, and could impose penances on those found guilty, but that they should not decide issues of tenure. The church courts were also alleged to set free the clerical criminals handed over to them, once they had been stripped of their orders: they were declared not to be obliged to return them to the secular courts, but they should not free them or put them where the king's justices could not do justice upon them (e.g. in a church); this applied particularly to those charged with rape, whom clerical judges were inclined to allow to purge themselves by oath. When someone escaped from the place where he had been imprisoned until he redeemed himself for a less serious offence, the clergy should not give him shelter and so deprive his lord of

<sup>89</sup> *Recueil des Actes de Philippe Auguste*, ii. 88.

<sup>90</sup> *Les Registres de Philippe Auguste*, 66–7.

<sup>91</sup> *Recueil des Actes de Philippe Auguste*, ii, nos. 899, 900; *Les Registres de Philippe Auguste*, 56–9 (no. 14); *Ordonnances des Roys de France*, i. 39–42.

his chattels and fine. When burgesses and villeins left their property to sons who were clergy, the latter must not claim immunity from service to the landlords. Bishops should not require burgesses or others to swear that they never lent money in usury. Cases brought by clerks about vines and burgage rights and the ownership of serfs should be heard in the landlords' courts, not the Church's. The clergy should not excommunicate people for selling corn and other goods on Sundays, nor for doing business with Jews, though they were welcome to excommunicate Christians who wet-nursed for them. Finally no lord should be excommunicated or have his land placed under interdict for the offence of his servant, or for any offence at all before he or his bailiff had been summoned, and at his first appearance before ecclesiastical justices no one who had not previously defaulted or been excommunicated should be bound by oath to accept the court's order.<sup>92</sup>

#### JUSTICE BY ROYAL WRIT IN ENGLAND

In 1166, fourteen years after Frederick Barbarossa's great *Landfriede* and eleven after Louis VII's ten-year peace for the kingdom of France, Henry II, king of England (1154–1189), duke of Normandy and Aquitaine and count of Anjou, promulgated the Assize of Clarendon. By the counsel of the archbishops, bishops, abbots, and his other barons Henry 'decreed for the preservation of the peace and the maintenance of justice' (*statuit pro pace servanda et justitia tenenda*) that inquiry about notorious murderers, thieves, and those who harboured them should be made in every county, on the oaths of twelve of the more lawful men of each hundred and four lawful men of each township.<sup>93</sup>

The German parallel is clearer if all Henry's measures to restore stability after the Anarchy of Stephen's reign are taken into account. 'For the common restoration of my whole realm', Henry had promised in his coronation charter, '... holy Church and all my earls, barons and vassals' should have 'their customs, gifts, and liberties ... as freely and peaceably and fully' as King Henry, his grandfather, granted and conceded them. This meant first of all a definition of the rights of the Church—and a sharper demarcation of the rights and powers of the king over against the Church. The Constitutions of Clarendon of January 1164 purported to be just such a statement of the customs and liberties of the king's ancestors with regard to the English clergy.<sup>94</sup> It is

<sup>92</sup> *Recueil des Actes de Philippe Auguste*, ii, nos. 899–900.

<sup>93</sup> *Chronica Magistri Rogeri de Hovedene*, ed. William Stubbs, ii (London: Rolls Series, 1869), pp. cii–cv, 248–52: tr. in *EHD* ii. 407–10.

<sup>94</sup> *Select Charters and other Illustrations of English Constitutional History*, ed. William Stubbs (9th edn., Oxford: Clarendon Press, 1913), 158, 163–7: tr. in *EHD* ii. 407, 718–22.

notable that the first and second constitutions, asserting the jurisdiction of the king's court over disputes about advowsons, even when these were between ecclesiastical lords, and the inalienability of churches on the king's estates, concerned problems Frederick I had touched on in the seventeenth chapter of his *Reichslandfriede*, forbidding the abuse of rights of advocacy. Though it was little compared with the German aristocracy's exploitation of the church lands they 'protected', the right of many English landlords to present parish priests to their livings was a valuable sort of real property, and it was important that the king should control it. The third and most celebrated constitution recalls the sixth chapter of the *Landfriede* which had made clerks who committed crimes against the peace pay fines to the count as well as submit to the discipline of the bishop, and rendered them liable to outlawry if they resisted.<sup>95</sup> But Henry went further and ordered his justices to 'send to the court of holy Church to see how the case is there tried. And if the clerk be convicted or shall confess, the Church ought no longer to protect him.'

In chapters 8 and 9 of the *Landfriede* of 1152 Frederick had dealt with the situation which was most disruptive of a landholding society: conflicting claims to the same pieces of property. If the sitting tenant could bring his overlord before the count to warrant the grant of the tenement and prove 'by suitable witnesses' that it had not been unjustly seized, the land should be confirmed to him. If several claimants produced different grantors, the judge should seek a sworn verdict from two men of the area of good repute as to who had possession which was gained without violence.<sup>96</sup> Henry II also made the protection of just possession or 'seisin' a central element of his peace. Probably in 1166, but separately from the main Assize of Clarendon, Henry ordered an inquiry into recent dispossessions, and for a few years fines owed by those found culpable appeared on the pipe rolls of the royal exchequer.<sup>97</sup> By the Assize of Northampton of 1176, which claimed to reaffirm and revise the assizes made at Clarendon, the king's justices were again instructed to cause report to be made of disseisins 'committed against the Assize' since a new date of limitation: the king's return from Normandy to England after the rebellion led by his son in 1173-4.<sup>98</sup>

As well as punishing disseisin, enforcing 'the assize of wicked robbers

<sup>95</sup> *Constitutiones et Acta Publica Imperatorum et Regum 911-1197*, MGH Legum Sectio 4, i. 196-8; cf. B. Arnold, *Princes and Territories in Medieval Germany*, 167-8, 195-202 on ecclesiastical advocacy in Germany.

<sup>96</sup> *Constitutiones* . . . 911-1197, i. 197.

<sup>97</sup> Haskins, *Norman Institutions*, 329-33; *Royal Writs in England from the Conquest to Glanvill*, ed. R. C. van Caenegem, Selden Soc. 77 (London, 1959), 284-5.

<sup>98</sup> Stubbs, *Select Charters*, 179-81: tr. EHD ii. 411-13.

and evildoers' throughout the counties they traversed, reporting on the custody of castles and making sure that unauthorized castles were razed to the ground, the justices were also, by the Assize of Northampton, to determine all suits pertaining to the crown 'through the writ of the lord king' which concerned 'half a knight's fee or under', unless the justices found the cases too difficult to decide 'without the lord king'. When a freeholder died they were to see that his heirs had seisin of his lands and his widow her dower; if the lord of the fief denied the heirs seisin, what the deceased held in fee at his death should be established by the inquiry of twelve lawful men and restored to the person they found to be the nearest heir. By 1179 the evidence is clear in the Pipe Roll that an heir could purchase a writ to begin this action or assize of *mort d'ancestor* ('assize' was applied both to the assembly in which the king made law and to the form of trial provided), and anyone recently dispossessed of his tenement without a judgment against him could have a writ to begin an action of *novel disseisin*, likewise decided by the 'recognition' of a jury. The first treatise on the common law of England, which claims to have been written 'under the direction of the illustrious Rannulf Glanvill', Henry II's justiciar, is essentially an account of the workings of the 'petty assizes' of *mort d'ancestor*, *novel disseisin*, *darrein presentment*, and *utrum* (the last two the application of jury trial to disputes about advowsons, and to the question whether land was held by a churchman 'in free alms' and therefore exempt from feudal services). 'Glanvill' also describes a new Grand Assize. Whereas limited questions about events such as unjust disseisin in the recent past could be settled relatively easily by a petty assize jury, the much more difficult issue of the ultimate right to the land had been resolvable only by the judgment of God delivered through a battle between the champions of the claimants to the 'greater right', a trial held in an overlord's court, or brought by writ into the king's court. The Grand Assize was provided as an alternative which took account of 'human life and civil status' (defeat in battle could remove both of these). The tenant was now offered the choice of trial by 'twelve knights of the neighbourhood who best know the truth of the matter' to be elected by four knights brought to the king's court by the sheriff. To divert the case from battle to assize the tenant purchased from the royal chancery a 'writ of peace' (*breve de pace habenda*).<sup>99</sup>

What made Henry II's peace different from Frederick Barbarossa's, and fostered the growth within it of the earliest forms of action of the common law, was the administrative power of the king's household,

<sup>99</sup> *Royal Writs in England*, 297–335, 444–66; *The treatise on the laws and customs of the realm of England commonly called Glanvill*, ed. and tr. G. D. G. Hall (London, 1965), I, 26–33, 148–70.

extending to the corners of a land much smaller than Germany or France. This power was expressed in the brutally direct, arenga-less, writs which ordered the fulfilment of a feudal obligation or collection of a fine, and even before the Norman Conquest might order the thegns in the shire court to settle for the king disputes about land-grants.<sup>100</sup> Twenty years after the Conquest, the Domesday commissioners were taking from juries assembled by the sheriffs verdicts on conflicting claims to fiefs. Under the authority of the king a set of rules about the holding and inheritance of land was in place by the 1130s and needed neither an Anarchy nor exceptional originality on the part of Henry II to become the basis of the Common Law. What was needed was better means of enforcement. The land actions were the end-product of a persistent royal intervention to enforce the rights and obligations of lords and tenants, especially the obligation of lords to warrant their own and their ancestors' grants. The king stepped in first to protect the lands of churches, because they had often lost the patronage of (Anglo-Saxon) founding families at the Conquest.<sup>101</sup>

The earliest orders to overlords or sheriffs to 'do right' concerning encroachments on church lands may have followed from specific grants of the king's peace. The Conqueror thus confirmed to Abbot Aethelwig the lands of Evesham *cum mea bona pace et protectione*: the sheriff was (therefore?) to prevent any injury to the abbot's property, and 'if anyone presumes to do him any injustice, let the Abbot complain to me, and I will do him full justice concerning his complaint'.<sup>102</sup> The relationship which the king established with ecclesiastical landholders was from the first one of public authority, not private lordship, and this spread by way of dispute-settlement to laymen, who sought writs of right to counter those obtained by churchmen. The right to be done might be the occupant's return of the property in dispute or an overlord's hearing of the case in his honour court, but the writ increasingly often ended: 'unless you do it, my sheriff will' or 'my itinerant justices shall do it'.<sup>103</sup> 'Glanvill' knows a formal procedure to prove that the lord's court did not do right and bring the case into the king's court; and there the Grand Assize, begun by the writ of peace, was available to settle cases

<sup>100</sup> EHD i. 379 (cap. 40); F. E. Harmer, *Anglo-Saxon Writs* (Manchester UP, 1952), 160, 183-4.

<sup>101</sup> J. Hudson, *Land, Law, and Lordship in Anglo-Norman England* (Oxford: Clarendon Press, 1994); id., 'Anglo-Norman Land Law and the Origins of Property', in *Law and Government in Medieval England and Normandy: Essays in honour of Sir James Holt* (Cambridge UP, 1994).

<sup>102</sup> A. Harding, 'The Medieval Brieves of Protection and the Development of the Common Law', *Juridical Review* (1966), 115-49, at 127.

<sup>103</sup> H. L. Macqueen, *Common Law and Feudal Society in Medieval Scotland* (Edinburgh UP, 1993), 44 ff. for the early intervention of the king of Scots on behalf of ecclesiastical land-lords.

of right to land, advowsons, debt, and dower, 'avoiding the doubtful outcome of battle'. From the general writ of right there developed the writ 'praecipe quod reddat' which, as set out by 'Glanvill', instructed the sheriff to 'order' a defendant to return a tenement or repay a debt to the plaintiff, and if he refused, to summon him before the king or his justices at a certain date to show why.<sup>104</sup>

English land-law was a by-product of the 'tremendous authority of royal majesty'<sup>105</sup> over the magnates which Norman kings inherited from their Anglo-Saxon predecessors and applied to the disputes of the knightly society which they transported from France. The assize of *novel disseisin* may have been devised first of all to prevent the lord himself from taking back a tenement for an alleged misdemeanour on the tenant's part, and *mort d'ancestor* was almost certainly directed first against the lord who tried to keep an heir out of his inheritance.<sup>106</sup> The king required that lords vouch for ('warrant', guarantee) their grants to tenants when outsiders claimed their tenements and, if the claims were successful, that they gave them others of equal value. Such obligations were extended down the generations. 'Glanvill' states baldly that 'the heirs of donors are bound to warrant to the donees and their heirs reasonable gifts'.<sup>107</sup> Tenants (and virtually all lords were the tenants of others for some of their lands) became eager for the king's charters and writs. The wealth of the subjects who wanted these favours combined with the financial necessities of the king to give the law what Maitland called 'its most repulsive features: if anyone has a right in England, that right must be a saleable commodity'.<sup>108</sup> Of the three thousand or so known grants of Henry II, half were sought in the first few years of the reign, predominantly by monasteries and cathedral chapters, to confirm the landholding situation as it was claimed to have been before the Anarchy. The grants that we have from Henry II were largely preserved by the churches which received them: the almost 500 royal acts recorded in the chancery's new charter rolls for the first year of King John (1199–1216) suggest that grants had always been more equally split between churches and individual laity.<sup>109</sup>

Often a royal charter included protection from being sued for a free

<sup>104</sup> *Royal Writs in England, 1155–1260*, 413–38, 482–95; *Glanvill*, 136–41; P. Hyams, 'Warranty and Good Lordship in Twelfth Century England', *Law and History Review*, 5 (1987), 437–503.

<sup>105</sup> *Leges Henrici Primi*, 96–7 (6. 2a); J. Campbell, 'The Late Anglo-Saxon State: A Maximum View', *Proceedings of the British Academy*, 87 (1995).

<sup>106</sup> S. F. C. Milsom, *The Legal Framework of English Feudalism* (Cambridge UP, 1976).

<sup>107</sup> *Glanvill*, 74; Hyams, 'Warranty and Good Lordship', 476.

<sup>108</sup> F. Pollock and F. W. Maitland, *History of English Law before the Time of Edward I*, 2 vols. (Cambridge UP, 1898), ii. 327.

<sup>109</sup> J. C. Holt, 'The Writs of Henry II', in *The History of English Law: Centenary Essays on 'Pollock and Maitland'*, ed. John Hudson (Oxford UP for the British Academy, 1996).

tenement without the king's express order. By 1200 a maxim was developing into a rule that no one could be made to answer for his freehold, in his lord's court or anywhere else, except on the authority of a royal writ.<sup>110</sup> Into the thirteenth century the writs that formed the basis of Glanvill's treatise were being adapted and supplemented to provide new remedies. Notably *writs of entry* allowed claimants to recover lands which tenants had entered legally but only (for example) by means of leases which had now expired or as the heirs or grantees of now dead disseisors.<sup>111</sup>

The development of the forms of English law was erratic and improvised. The strength of the law was in its integration, by the king's will, of communal processes of dispute-settlement in the courts of lordship and shire with the expert jurisdiction of royal and ecclesiastical judges. The king of England did not, like the German emperors, ordain a peace and leave its enforcement to the magnates. Even when they were abroad—and in the twelfth century they spent much time in their French dominions—Norman and Angevin kings continued to institute legal proceedings in English courts by writs *de ultra mare* addressed to their English viceroys, the justiciars, who carried on the process by further writs to the sheriffs.<sup>112</sup> In the early part of the twelfth century the local public courts reigned supreme. Henry I had asserted, in an edict communicated to the counties by writs, that the king's shire and hundred courts should be held at the same times and places as before the Conquest ('and not otherwise'), and be attended by all the men of the shires to hear the king's pleas and judgments; and he had extended the shire court's jurisdiction in land cases to cover disputes between the men of two different lords (and not just where these lords were tenants-in-chief), since there were then two competing honour courts.<sup>113</sup> Probably from the time of the Conquest there was the procedure called *tolt* (set in motion by simple complaint to the sheriff) for demonstrating that there had been a default of right in a seignorial court which justified the shire court in taking over.<sup>114</sup> Henry I experimented with 'justices of all England' (*justitiiarii totius Anglie*) to go from his court on a journey (*iter*, 'eyre') throughout the counties, to hear a variety of pleas (rather than the single great lawsuits which the *curia regis* had dealt with before), but he also fostered the appointment of justiciars for individual

<sup>110</sup> *Royal Writs in England*, 214–25, 496–9.

<sup>111</sup> *Early Registers of Writs*, ed. E. de Haas and G. D. G. Hall, Selden Soc. 87 (London, 1970), pp. xlii–xliii; G. D. G. Hall, 'The Early History of Entry sur disseisin', *Tulane Law Review*, 42 (1967–8), 584–602.

<sup>112</sup> D. Bates, 'The Origins of the Justiciarship', *Anglo-Norman Studies*, 4 (1981), 1–12; id., 'The earliest Norman writs', *EHR* 100 (1985), 269 ff.

<sup>113</sup> *EHD* ii. 433–4.

<sup>114</sup> D. M. Stenton, *English Justice between the Norman Conquest and the Great Charter* (London, 1965), 27, 138–9.

counties, to hear in courts of their own the pleas (either criminal or based on royal grants of land or peace) which were reserved to the king.<sup>115</sup> In fact, it seems more and more probable that Henry I only confirmed an office the beginnings of which lay in the reign of William II or even that of the Conqueror himself. It was in the 1070s that a special shire justice with more judicial expertise than the sheriff would have become necessary, for an ordinance of about 1072 reduced the participation of churchmen in shire and hundred courts.<sup>116</sup> At any rate, by Stephen's reign the office of county justiciar had become an object of ambition for the greatest barons. In Lincolnshire it was granted in 1154 to the third bishop of Lincoln in succession.<sup>117</sup>

In 1166, Henry made a decisive change of direction. There is evidence to suggest that a lost assize first gave to the sheriffs and local justices the task of prosecuting murderers and robbers named by presenting juries, and that the Assize of Clarendon transferred the responsibility to royal justices in eyre when the campaign was already under way.<sup>118</sup> This was the beginning of a phase in the development of English justice lasting almost to 1300, which was dominated by periodic eyres of the country *ad omnia placita*, that is with authority to hear all types of pleas, both criminal and civil.<sup>119</sup> The sheriffs continued to deal with lesser crimes on their twice-yearly 'tours' of the hundred courts, and to hear in the shire courts, either on complaint or instructed by royal writs of *justicies*, civil cases of small value but much significance to the local community concerning debt, nuisance, the return of fugitive villeins to their lords, and unjust distraint (the seizure of farm animals and chattels to compel the fulfilment of obligations).<sup>120</sup> The great land cases of the aristocracy were removed from the jurisdiction of the shire court by writs of *pone* ordering the sheriff to put cases before the king's justices, and by the new assizes.<sup>121</sup> The whole judicial system nevertheless depended utterly on the administrative zeal of the sheriff, for it was he who acted on the returnable writs which were at the heart of Henry II's innovations; he who assembled the jurymen, got them to view the land in dispute, and ensured that they and the parties appeared before the justices in eyre

<sup>115</sup> Stenton, *English Justice*, 54–69; J. Green, *The Government of England under Henry I* (Cambridge UP, 1986), 107–10.

<sup>116</sup> EHD ii. 604–5.

<sup>117</sup> Stenton, *English Justice*, 66.

<sup>118</sup> D. Corner, 'The Texts of Henry II's Assizes', in *Law-making and Law-makers in British History*, ed. A. Harding (London: Royal Historical Society, 1980), 15–20.

<sup>119</sup> D. Crook, *Records of the General Eyre*, Public Record Office Handbooks, no. 20 (London: HMSO, 1982).

<sup>120</sup> A. Harding, *The Law Courts of Medieval England* (London, 1973), 23, 37, 51–3, 58, 60, 72–3, 74.

<sup>121</sup> *Early Registers of Writs*, 16 (53).



when they came to the shire, or (more difficult) in the *curia regis*, wherever that might be; and he who returned legal writs, with notes of what he had done, to the appropriate justices, thus informed of the nature of the case to be heard.<sup>122</sup>

In 1170 there was an Inquest of Sheriffs, followed by a change of personnel which was more sweeping than previous replacements. The purpose of that inquiry was to see that the judicial system centred on the eyres was working properly in such respects as the making of excuses or 'essoins' by litigants for non-appearance (cap. xiii), and particularly the custody of the chattels due to the king from the felons convicted under the Assize of Clarendon. The king also demanded to know about persons unjustly accused out of hatred or for reward, and those let off for money (caps. vi, x); and about such misdemeanours not only on the sheriffs' part, but also on the parts of the king's foresters and of archdeacons and deans in the exercise of their disciplinary functions (caps. viii, xii). Let it all 'be accurately and carefully written down' (cap. iii). 'And after they have been examined, let my sheriffs and officers go about my other business, and swear that they will attend to the holding of inquisitions on the lands of the barons, according to the law' (cap. xvii).<sup>123</sup>

The Assizes of Clarendon and Northampton, along with the Assize of Arms of 1181 and the Assize of the Forest of 1184 placed tighter controls over the whole populace, and gave extensive powers and responsibilities to the king's officers in enforcing them. The sheriffs might enter any borough, castle, or liberty, 'even the honour of Wallingford', to arrest murderers and thieves, and gaols were to be built in every shire to accommodate the accused until they could be put to the ordeal; even those absolved before the justices, if they had been 'openly and disgracefully spoken of by the testimony of many and that of lawful men' were to abjure the realm; a religious house was not to receive a man of the lower orders as a monk until his reputation was known, 'unless he shall be sick unto death'; no one 'in all England' should receive members of the sect of Cathar heretics 'branded and excommunicated at Oxford', and any house in which they dwelt should be 'carried outside the village and burnt'; dogs caught in the king's forest were to be mutilated.<sup>124</sup> For the eyre of 1194 a list of questions

<sup>122</sup> Harding, *Law Courts of Medieval England*, 51–3, 58, 60, 74; Green, *Government of England under Henry I*, 207.

<sup>123</sup> EHD ii. 438–48; J. Boorman, 'The sheriffs of Henry II and the significance of 1170', in *Law and Government in Medieval England and Normandy: Essays in honour of Sir James Holt*, ed. G. Garnett and J. Hudson (Cambridge UP, 1994); J. Beuoroy, 'Centralisation et histoire sociale: remarques sur l'*Inquisitio Vicecomitum* de 1170', *Cahiers de Civilisation Médiévale*, 37 (1994).

<sup>124</sup> EHD ii. 407–13, 416–20 (nos. 24, 25, 27, 28).

was drawn up which the parties of justices were to address to the juries on their circuits. The concerns of the 'chapters of the eyre' ranged from the state of the king's demesne lands, through the affairs of the Jews, to the malpractices of the sheriffs and bailiffs. Confronted by King Richard's enormous demands from abroad for money, first for his crusade and then to ransom himself from a German prison, and at home by the revolt of Count John, the king's brother, the justiciar and archbishop of Canterbury, Hubert Walter, turned the eyre into a highly organized political and financial as well as judicial instrument. Justice was *magnum emolumentum*, a great source of profit to the king, and a chronicler described the eyre of 1194 as reducing all England to poverty. The *capitula itineris* were an important new form of law-making—the only form open to Hubert Walter in the absence of the king—and the steady lengthening of the list in the thirteenth century reflects the growing scope of English government.<sup>125</sup>

Chapter 20 of the instructions of 1194 ordered the appointment of three knights and a clerk in each county as keepers of the pleas of the crown. Their job was to record the initial proceedings in criminal cases: the finding of bodies ('coroners' still hold inquests on suspicious deaths); the indictment of the suspected killers by juries of the neighbouring villages; the surviving victims' exhibition of their wounds and formal commencement of accusations ('appeals of felony') in the shire court; and the felons' confessions or abjurations of the realm or outlawry.<sup>126</sup> The king's justices were asserting control over the established forms of criminal trial, the unilateral ordeals or the judicial duel between the accused and a private appellant.<sup>127</sup> Chapter vi of the Inquest of Sheriffs demanded inquiry into accusations made from spite or for reward, and in cap. 36 of Magna Carta King John promised the free granting of 'the writ of inquisition of life and limb'—that is, to inquire whether an accusation of crime carrying such penalties was brought 'out of hatred and malice'.<sup>128</sup> In this way the jury was being introduced into the criminal process in England before Pope Innocent III, in that same year of 1215, forbade clergy to bless the instruments of the ordeal in order to invoke God's judgment, so forcing the use of 'petty' juries (distinct in concept though not always in membership from presenting or 'grand' juries) to decide on the guilt of criminals in

<sup>125</sup> EHD iii. 1189–1327, ed. Harry Rothwell (London, 1975), 303–6; Harding, *The Law Courts of Medieval England*, 64–5.

<sup>126</sup> EHD ii. 304; Harding, *Law Courts*, 74.

<sup>127</sup> Bartlett, *Trial by Fire and Water*, caps. 4 and 5; P. R. Hyams, 'Trial by Ordeal: The Key to Proof in the Early Common Law', in *On the Laws and Customs of England: Essays in Honor of Samuel E. Thorne*, ed. M. S. Arnold *et al.* (Chapel Hill: U. of North Carolina Press, 1981), 121–6.

<sup>128</sup> EHD ii. 439–40; Beauroy, 'Centralisation et histoire sociale', 19; J. C. Holt, *Magna Carta*, 2nd edn. (Cambridge UP, 1992), 460.

England.<sup>129</sup> Judicial duels continued, though the justices did their best to discourage them, except in the case of 'approvers': felons who clutched at the chance of a reprieve if they could defeat and thus convict a number of their accomplices in successive bloody combats. The majority of normal appeals of felony were not prosecuted to the end, but the justices would still take the verdict from a jury and punish the accused for any 'trespass against the king's peace'.<sup>130</sup> Trespassers were punished by imprisonment and a fine, but felons convicted by appeal or under the assize of Clarendon lost a foot, to which the Assize of Northampton, 'for the sake of stern justice', added the loss of the right hand and abjuration of the realm within forty days. In the course of the thirteenth century hanging became the normal penalty for felony.<sup>131</sup>

Jury-trial instead of the ordeal, and abjuration of the realm rather than exile from the diocese, were examples of a new, secularized, royal justice. The development of a hierarchy of ecclesiastical courts held by bishops and their 'officials', archdeacons and commissaries, at the same time as the rapid growth of the king's courts created tensions between church and state, which showed themselves most dramatically in the murder of Archbishop Becket in 1170. Yet the church courts were indispensable to the whole community, for in them were settled disputes about marriage-contracts, wills (and thus the descent of moveable property), defamation, and a variety of breaches of faith. At the parish level they enforced a moral discipline over clergy and laity. When diocesan statutes became common in the thirteenth century they regularly included the pronouncing of excommunication against those who 'disturbed the peace of the lord king and the tranquillity of the realm' and also against infringers of the terms of Magna Carta. On the other hand, the bishops depended on the king's officers for the arrest of people who refused to submit to ecclesiastical jurisdiction, and the clergy, as possessors of a huge share of the land of England, provided much of the civil business of the king's courts. The Angevin state was an amalgam of royal and ecclesiastical governance, but with the king as its directing force. Bishops were ordered like sheriffs to enforce the rights the king granted to churches, and the Inquest of Sheriffs also targeted extortionate archdeacons and deans. And to a large extent the clergy staffed the king's household administration and the central courts which crystallized from it.<sup>132</sup>

<sup>129</sup> Constitution 18 of the Fourth Lateran Council.

<sup>130</sup> *Roll of the Shropshire Eyre of 1256*, ed. A. Harding, Selden Soc. 96 (London, 1980), p. xxxiv.

<sup>131</sup> *EHD* ii. 411.

<sup>132</sup> Harding, *Law Courts of Medieval England*, 43-9; C. Morris, 'From Synod to Consistory: the Bishops' Courts in England, 1150-1250', *Journal of Ecclesiastical History*, 22 (1971), 115-23; Pollock and Maitland, *History of English Law*, i. 74-5, ii. 402; A. Harding,

In 1158 Richard of Anstey in Hertfordshire began a suit for estates left by his uncle, William de Sackville, which was to last for five years. First, he had to send one of his men to Normandy to get a writ from the king to take to Eleanor, the queen-regent in England; she issued another writ which Richard delivered to the justiciar, Richard de Lucy, and a hearing was arranged before him at Northampton. There the tenant of the lands, Mabel de Sackville, asserted her right as William's daughter by his second marriage, and the case was adjourned. In fact, Richard of Anstey had already sent to Normandy for another writ, this time to Archbishop Theobald of Canterbury, to order an investigation of Richard's claim that Mabel was illegitimate, since her father had not been free to marry her mother. Richard appeared seventeen times in the archbishop's court and once travelled to Toulouse for another writ, as Mabel delayed the case on every conceivable excuse, and finally in October 1160 he appealed in exasperation to the pope. The necessary letter from the archbishop's chancery providing Rome with details of the case was obtained with difficulty, and some time in 1161 Richard's clerks returned with a papal rescript setting out the issues to be decided by judges-delegate in England. But Mabel now appealed to Rome herself, and only in December 1161 did Richard's clearly more able canon lawyers obtain a papal decretal confirming the tenant's illegitimacy, so that the case could be taken back to the king's court. Richard was waiting at Southampton when Henry returned to England in January 1162, but more writs had to be bought from king and justiciar, and he was finally awarded his inheritance at Woodstock in July 1163, after five years of incessant journeying and enormous expense.<sup>133</sup> Contrast with this story the situation by the end of the century, when there were royal courts able to carry cases forward without perpetual reference to the king in person: the court *coram rege* (the future 'king's bench'), first given definition in 1178 when, according to a chronicler, Henry II reduced the number of justices burdening the land from eighteen to five, two clerks, and three laymen, and ordered them to remain with the king's household wherever it went, to hear the complaints of the people; and the bench of justices at Westminster (the future 'court of common pleas') which Archbishop Hubert Walter, Richard I's justiciar, appears to have separated off from the exchequer board in the 1190s. (It was the

*England in the Thirteenth Century* (Cambridge UP, 1993), 86–92, 169, 240; *Councils and Synods, with Other Documents relating to the English Church*, ii. A.D. 1205–1313, ed. F. M. Powicke and C. R. Cheney (Oxford: Clarendon Press, 1964), 106–7, 332, 387, 434, 478–9, 809 etc.; *EHD* ii. 782–3, 932; Beauroy 1994, 19 (xii); for the judiciary under Henry II, see D. M. Stenton, *English Justice between the Norman Conquest and the Great Charter* (London, 1965), 73–87.

<sup>133</sup> P. M. Barnes, 'The Anstey Case', in *A Medieval Miscellany for Doris Mary Stenton*, ed. P. M. Barnes and C. F. Slade (Pipe Roll Soc. 76, 1962), 1–24; *EHD* ii. 456–7.

justices of the latter court, supplemented by experienced sheriffs, who were periodically sent out on eyre.)<sup>134</sup>

From 1194 there are plea-rolls of the justices *coram rege* and the Bench, necessary to keep track of all the procedural steps and adjournments in litigation, and sometimes recording final judgments. The plea-rolls, running on for common pleas and king's bench to the nineteenth century, a great wad of parchment for each of the four terms of each court in each year, were joined in the second half of the thirteenth century by reports of the arguments before the king's justices of a new class of professional lawyer. English law was essentially the jurisprudence of the king's courts.<sup>135</sup>

'OUR STATE AND OUR KINGDOM'S'

Angevin justice was impelled by the will of kings who saw no bar to acting 'without judgment' themselves, or to delaying and selling justice as their interests dictated. Men paid to have peace from the royal ill-will (*malevolentia*), which was the counterpart of the king's protection and openly given as justification for disseising his subjects.<sup>136</sup> From his accession King John drove the judicial system hard and effectively, and the barons generally welcomed the new legal procedures. What the king was forced to concede in Magna Carta was that he himself should observe them and refrain from using them as a means of extortion: not amercing (fining) even a villein so heavily that he had to sell his cart, his means of subsistence (cap. 20); not imprisoning, disseising, or exiling a free man 'except by the lawful judgment of his peers or by the law of the land' (cap. 39); and not selling or denying to anyone 'right or justice' (cap. 40).<sup>137</sup> John died in 1216 in the middle of a civil war, and it was left to a papal legate and a group of loyalist barons to safeguard the succession of Henry III and reconstruct the government. Magna Carta was reissued late in 1216 and again in 1217, when a Charter of the Forests was coupled with it. A yet more formidable exchequer machine was brought out of the financial disruption of the civil war. Judicial revenues bulked large in the exchequer's rolls after 1218, when eight groups of justices were sent out on eyre. The dispensation of justice according to the principles of the Charter was what the community looked for. When the baronial council, seemingly for political reasons,

<sup>134</sup> EHD ii. 482; P. Brand, *The Origins of the English Legal Profession* (Oxford: Blackwell, 1992), ch. 2.

<sup>135</sup> Harding, *Law Courts of Medieval England*, 51, 71; Brand, *Origins of the English Legal Profession*, 16–17; Pollock and Maitland, *History of English Law*, i. 108.

<sup>136</sup> J. E. A. Jolliffe, *Angevin Kingship* (London, 1955), 64, 68, 76, 94–9, 107.

<sup>137</sup> Stenton, *English Justice*, ch. 4; Holt, *Magna Carta*, 322, 327.

allowed the reopening of a case of novel disseisin decided against the earl of Aumale in the eyre of Lincoln, the shire rose up in protest and demanded the 'common liberty of the whole realm granted and sworn'.<sup>138</sup> In the king's courts peasants learnt to assert their personal freedom or special privileges as villeins of the king; townsmen to claim their right not to have to plead in most cases outside the borough court; and barons, bishops, and abbots to sue each other for damage to their 'liberties' to hold fairs or hang thieves.<sup>139</sup>

A judicial system which was created by the naked will of the king, but made to relate his powers to his people's rights, provided a fruitful context for the definition of the 'state of the king' (*status regis*) in England. In the twelfth century 'crown' was sometimes used as an abstract term for the prerogatives of the king. Criminal pleas were called 'pleas of the crown', and the Assize of Northampton instructed the justices in eyre 'to determine all suits and rights pertaining to the lord king and to his crown through the writ of the lord king'.<sup>140</sup> An ordinance of Henry III in 1256 forbade the alienation without permission of the lands tenants-in-chief held from the king, as intolerably damaging to the 'crown and royal dignity'.<sup>141</sup> The 'royal dignity' was regularly coupled with 'crown' to emphasize the king's public standing, particularly in writs to ecclesiastical authorities.<sup>142</sup> In origin, however, 'crown' seems to have pointed to the lord paramount's rights over his vassals, whereas the earliest reference to the *status regis* in England is in connection with the king's power to tax his subjects generally. The dedication to Henry II of the *Dialogus de Scaccario*, a description of the workings of the exchequer written between 1177 and 1179 by Richard fitz Neal, royal treasurer, judge of common pleas, and at the end bishop of London, argues that the power of rulers comes from God in the form of material wealth, and that 'we [clerics] ought to serve them by upholding not only those excellencies in which the glory of kingship displays itself but also the worldly wealth which accrues to kings by reason of their state (*sui status ratione*). Those confer distinction, this gives power.' In their careful collection, guarding, and distribution of the king's money, exchequer officials 'must give account of the state of the realm (*decet . . . rationem reddituris de regni statu*), the security of

<sup>138</sup> *Rolls of the Justices in Eyre for Lincolnshire 1218-19 and Worcestershire 1221*, ed. D. M. Stenton, Selden Soc. 53 (London, 1934), p. lii.

<sup>139</sup> A. Harding, *England in the Thirteenth Century* (Cambridge UP, 1993), 70, 130; *Roll of the Shropshire Eyre of 1256*, p. li.

<sup>140</sup> *EHD* ii. 412.

<sup>141</sup> *Ibid.* iii. 360.

<sup>142</sup> E. H. Kantorowicz, *The King's Two Bodies: A Study in Medieval Political Theology* (Princeton UP, 1957), 149, 187 (n. 200), 380; *Glanvill*, 113-14 (ix, 5); see G. Garnett, 'The Origins of the Crown', in *The History of English Law*, ed. Hudson, for the use of 'the crown' in relation to the church.

which depends upon its wealth'. The deployment of resources and the dispensation of justice were combined inextricably in the king's state. The Assize of Clarendon, 'made in the interests of peace' (so says the *Dialogue*), gives the chattels of condemned villeins to the king, since their lords, if they received them, might connive at the conviction of innocent people. The justiciar presides over both the justices and the exchequer, where the highest skill 'does not lie in calculations, but in judgments of all kinds'. Only the king's forests are outside the common law of the realm (*communi regni iure*), 'so that what is done in accordance with forest law is not called "just" without qualification, but "just, according to forest law"'.<sup>143</sup>

A 'constitutional' idea of the state of the king is implied in a letter from Pope Innocent III to the barons of England in the spring of 1215. The pope wrote that he had instructed John to treat them kindly, and they should know that by divine grace the king was changed into a better state (*in meliorem statum esse mutatum*): they were therefore required to stop their conspiracies against him and, with their heirs, to pledge obedience to him and his successors.<sup>144</sup> The struggle for liberties at the end of John's reign and even more the restoration of peace after John's death were the circumstances in which the 'unrationalized force' and 'sustained uniformity of action' of Angevin kingship began to acquire the intellectual justification which J. E. A. Jolliffe thought it had previously lacked.<sup>145</sup> The 'state of the king' and the 'state of the kingdom' were brought into explicit relationship. The interests of king and realm had long been coupled together in royal documents. The *Leges Henrici Primi* had recorded Henry I's ordinance that shire courts should be held at fixed places and times, and that the people of the country should not be burdened by extra meetings unless 'the king's own need or the common advantage of the kingdom' required it.<sup>146</sup> Henry II continued the traditional juxtaposition of the salvation of the king's soul and the advance of the prosperity of his realm as the objectives of grants to churches; and he demanded that the papal messengers who claimed to have come out of concern 'for our honour and the exaltation of the kingdom' should reverse Becket's excommunication of royal supporters.<sup>147</sup> Magna Carta was granted 'for the salvation of our soul and the souls of our ancestors and successors ['heirs' in the original charter],

<sup>143</sup> *Dialogus de scaccario*, ed. and tr. C. Johnson (London, 1950), 1-3, 14-15, 60, 101-4; R. S. Hoyt, 'Royal Taxation and the Growth of the Realm on Mediaeval England', *Speculum*, 25 (1950); Kantorowicz, *The King's Two Bodies*, 342-6.

<sup>144</sup> *Foedera*, 1 (i), p. 127.

<sup>145</sup> Jolliffe, *Angevin Kingship*, 87.

<sup>146</sup> *Leges Henrici Primi*, ed. Downer, 98-9.

<sup>147</sup> G. Post, 'Status Regis: Lestat du Roi in the Statute of York', in his *Studies in Medieval Legal Thought* (Princeton UP, 1964), 383-4.

the exaltation of Holy Church, and the reform of our kingdom'.<sup>148</sup> On Henry III's accession William Marshal, earl of Pembroke, was appointed 'regent of ourselves and of the realm'; and in the early years of Henry's reign Pope Honorius instructed his legate to collect an aid from the clergy 'for the uses of the said king and realm', and ordered Archbishop Langton not to put himself against the realm or the king so long as they remained faithful to the Roman church.<sup>149</sup> The legate Pandulph demanded that the justiciar Hubert de Burgh redress an injury inflicted on one of his servants *contra pacem domini regis et regni*, and was himself urged to come to London to deal with 'the urgent business of king and kingdom'.<sup>150</sup> Peril was seen 'to the king and his kingdom', if William Marshal did not surrender certain lands in settlement of Queen Berengaria's dower, and the justiciar agreed to financial arrangements prescribed by the legate, since they were 'to the honour of God and the advantage of the lord king and realm'.<sup>151</sup> Pandulph declared robberies near Winchester a reproach to the king and a scandal and hurt to the whole realm. Henry acknowledged debts to Florentine merchants for the use of himself together with his kingdom.<sup>152</sup>

This is the time when 'state' acquires constitutional significance as the term for king and kingdom in relationship to each other. One of the baronial government's first actions was to write in Henry III's name to his justiciar in Ireland, informing him of John's death and the new king's coronation and confirmation of chartered liberties, and expressing confidence that 'the state of our kingdom, favoured by divine mercy, will be changed for the better'.<sup>153</sup> In the first reissue of the Charter Henry left aside for fuller discussion and amendment certain 'weighty and doubtful' clauses in the original (such as the requirement of the consent of the realm to taxation), as matters concerning 'the common utility and peace of everyone' and 'both our state and our kingdom's' (*ad communem omnium utilitatem pertinuerint et pacem et statum nostrum et regni nostri*).<sup>154</sup> The pruning of the Charter suggests that a conflict was beginning to be discerned between the interests of king and realm, but in writing to foreign powers Henry preferred to identify the two states. In 1217 he explained in a letter to Pope Honorius that heavy expenditure *circa statum nostrum et regni nostri* prevented his payment of the 1000 marks due to the papacy annually from England. To the

<sup>148</sup> Holt, *Magna Carta*, 448–9, 501–2.

<sup>149</sup> *Royal and other Historical Letters illustrative of the Reign of Henry III*, ed. W. W. Shirley, 2 vols. (London: Rolls Series, 1862–6), i. 532–3 (nos. 4, 5).

<sup>150</sup> Ibid. i. 34–5, 79–80.

<sup>151</sup> Ibid. i. 70–1.

<sup>152</sup> Ibid. i. 167, 403.

<sup>153</sup> Though already in the ninth century Hincmar of Rheims could attribute to the king's council consideration of matters pertaining to the *statum regis et regni*: see p. 41 above.

<sup>154</sup> Holt, *Magna Carta*, 510 n.



king of Norway in the same year he expressed his willingness for a commercial treaty which would allow their merchants to come and go freely in each other's countries, and ending with a promise to inform King Haakon further of 'our state and our kingdom's' (using the same phrase as in the reissued Charter).<sup>155</sup>

The pope had a concern for the peace of kingdoms, not least to release their energies for crusading, and in particular for the tranquillity of the person and realm of 'his special son' King Henry, whose natural father had entrusted them to the church of Rome. The legate Gualo was told in 1217 that he had power to do anything for the advantage of that king and kingdom—to impose interdicts, excommunicate, degrade prelates and others who supported Prince Louis's invasion, and dispense men from vows of fidelity to Louis and even from crusading vows—'until the state of the kingdom, by God's grace shall be reformed for the better'.<sup>156</sup> When Henry reached sixteen in 1223, Honorius declared him of an age to have a limited use of the great seal, and the king thanked him profusely: it meant that he was able to take control of his castles and the government of the shires, and he had great hope for the consequent improvement of 'our state and our kingdom's', about which his messengers would inform the pope further. 'Zealous for the tranquillity of king and realm', Honorius instructed the English bishops to impose an interdict on the lands of Llywelyn of Wales.<sup>157</sup> A decade later, Pope Gregory IX exhorted Louis IX of France to make peace with Henry—this, out of zeal for the state of the French king's realm, his honour, and the tranquillity of his people, and in order to hasten a crusade; also desiring an increase of 'the state of peace in the kingdom of England, which the apostolic see especially loves', the pope instructed the archbishop of Canterbury and his suffragans to excommunicate murderers, arsonists, and all other peace-breakers.<sup>158</sup> In 1235 Henry wished Gregory to know of his prosperous state and the joyful tranquillity of his kingdom: the magnates and clergy were united with each other and with the king in mutual love, and there was hope (once more) that 'the state of us and our kingdom' would be reformed for the better.<sup>159</sup>

The state of the kingdom was being defined in relationship to an increasingly dominant royal state. Henry's servants and subjects reported on the state of Ireland or Poitou in terms of the preservation of the king's rights, and asked to be informed of his 'state and will [*statum*

<sup>155</sup> *Royal Letters*, i. 6–8; *Foedera*, 1 (i), 145, 149.

<sup>156</sup> *Royal Letters*, i. 527–9 (no. 1).

<sup>157</sup> *Ibid.* i. 212–14, 430–1; for papal exhortations regarding English affairs, see *ibid.* 540–1, 557, 558; Rymer, *Foedera*, 1 (i), 171.

<sup>158</sup> *Royal Letters*, i. 551–2 (no. 31), 554–5 (no. 33), 557–8 (no. 37).

<sup>159</sup> *Treaty Rolls preserved in the Public Record Office*, i. 1234–1325, ed. Pierre Chaplais (HMSO, London, 1955), 4–5.

*vestrum et voluntatem*].<sup>160</sup> The king complained to the pope in 1231 of the Irish bishops' denial of his custody of vacant sees and jurisdiction over their tenants 'to our grave prejudice and damage to the royal dignity';<sup>161</sup> in 1232, he commanded the monks of Canterbury not to act on the papal mandate of election to the archbishopric 'in prejudice of ourselves and our right';<sup>162</sup> and in 1233 he instructed the archbishop of York not to excommunicate certain nobles judged contumacious in a church court while an appeal was pending in defence of his state and a privilege earlier granted by the pope [*pro statu nostro et conservatione ejusdem privilegii*].<sup>163</sup> In 1235 the same archbishop was told by Henry to make ready to escort the king and queen of Scotland (the queen was Henry's sister) to a great council in London which would deal with certain difficult matters touching 'our state and the kingdom's', and Maurice Fitzgerald, the justiciar of Ireland, was assured in the same year that 'everything with us and the state of our kingdom is prosperous and pleasing' and informed that the king wished often to hear similar news 'of the state of our land of Ireland, along with your state'.<sup>164</sup>

In fact, Henry had just had a painful lesson in kingship, in an episode affecting Ireland. The king had emerged from his years of tutelage determined to assert his authority and seemed in 1232 to threaten the liberties of the barons, who resisted under the leadership of Richard the Marshal, earl of Pembroke, son of the great *rector regis and regni*. The Marshal's death in Ireland at the hands of Henry's servants was an enormous blow to the king's reputation and self-esteem. In letters to the emperor Frederick II, Henry put the blame on others for attributing to 'the fullness of royal power' the freedom of a king to do any injury he willed, and asked for the emperor's help in coming to terms with the Marshal's family, 'for the conservation of the royal state and the happiness of our land of Ireland (*ad conservacionem status regii et felicitatem terre nostre Hibernie*)'.<sup>165</sup>

For the pope the essence of the royal state was the inalienability of the rights and possessions of the Crown. In 1233 Gregory reminded Henry of his coronation oath to preserve such rights: the king's promises not to recall his grants were therefore invalid, and Henry might reincorporate what he had granted 'into the right and property of the crown and kingdom'. In stronger language the pope expressed in

<sup>160</sup> *Royal Letters*, i. 72-3, 82-6, 126-8, 177-8, 338-9; cf. *ibid.* 123 for *statum Walliae* used by Llywelyn, Prince of North Wales.

<sup>161</sup> *Royal Letters*, i. 399-400.

<sup>162</sup> *Ibid.* i. 406.

<sup>163</sup> *Ibid.* i. 413-14.

<sup>164</sup> *Ibid.* i. 462, 484-5.

<sup>165</sup> *Ibid.* i. 437, 467-9; *Treaty Rolls*, i. 35-6; F. M. Powicke, *King Henry III and the Lord Edward* (Oxford: Clarendon Press, 1947), 144-6.

1238 his grave disquiet that, 'on bad advice and with an improvident liberality', the king had been 'dispensing to prelates, churches, and other magnates of England, liberties, possessions, offices and many other things which belonged to the right and state of the crown [*quae ad jus et statum [et] coronae spectabant*], to the great prejudice of the Roman church, to which the realm of England is known to pertain, and the enormous damage of that realm'. The papacy seems at this time to have been expecting from kings the same public responsibility in the use of their property which it had been impressing on archbishops.<sup>166</sup>

Yet the king of England's state was surely more home-grown. In his letters it may mean no more than 'state of health', but in 1236 Henry assured Hugh de Lacy of the 'prosperity of our state' in addition to 'the healthiness of our body' and 'the tranquillity of our realm'.<sup>167</sup> It is clearly the constitutional status of the king which is discussed in the *summa* of *The Laws and Customs of England* traditionally attributed to the clerk and judge *coram rege* Henry de Bracton, a book which may have been substantially put together in the 1230s. In the opening tractate 'Of Persons', in the middle of a discussion of free and unfree status which is the normal content of the Roman law title *De Statu Hominum* (Digest, 1. 5), Bracton suddenly remarks that God is no respecter of persons yet with men there is a difference between them, 'for there are some of great eminence who are placed above others and rule over them': a hierarchy of pope, archbishops, and lesser prelates in spiritual matters, and 'in temporal matters which pertain to the kingdom, emperors, kings and princes, and under them dukes, earls and barons, magnates or vavasours and knights, also freemen and bondsmen. Various powerful persons are established under the king, namely earls who take the name "comites" from "comitatus" . . .' Later in the discussion *de statu personarum* Bracton continues: 'The king has no equal within his realm . . . The king must not be under man but under God and under the law, because law makes the king.' Since no writ runs against the king, he can only be petitioned for remedy against his own justices, and 'if he does not it is punishment enough for him that he awaits God's vengeance'.<sup>168</sup>

<sup>166</sup> *Royal Letters*, i. 551 (no. 30); *Foedera*, 1 (i), 234; the second *et* appears redundant; H. G. Richardson, 'The English Coronation Oath', *Speculum*, 24 (1949), 51ff.; P. N. Rosenberg, *Inalienability of Sovereignty in Medieval Political Thought* (New York: Columbia UP, 1956); Kantorowicz, *The King's Two Bodies*, 347–56.

<sup>167</sup> *Royal Letters*, i. 478–80, and cf. 135, 166, 178, 279, 283, 378, 478, 496 for reference to the king's and others' personal 'state'.

<sup>168</sup> *Select Passages from the Works of Bracton and Azo*, ed. F. W. Maitland, Selden Soc. 8 (London, 1894), 63–5; *Bracton on the Laws and Customs of England*, tr. S. E. Thorne, 4 vols. (Cambridge, Mass., 1968–77), ii. 32–3 (f. 5b); for the argument about the authorship of 'Bracton', see *ibid.* iii, pp. xxx–lii, J. L. Barton, 'The Mystery of Bracton', *Legal History*, 14 (1993), and P. Brand, 'The Age of Bracton', in *The History of English Law*, ed. Hudson.

Bracton appears confused about whether the king is above or under the law only if he is seen as attempting to construct a political theory with Roman law and Canon law maxims, rather than going about his actual business of describing the king's relationship to the judicial system in England.<sup>169</sup> In the tractate 'Of Acquiring Dominion'<sup>170</sup> he says that no one may question the meaning of the charters granted by a king who has above him only God and 'the law by which he is made king'. But an injurious grant may be referred to the king for amendment in his court, where, 'if he is without bridle, that is without law', the earls and barons 'ought to put the bridle on him'. The king 'has ordinary jurisdiction, dignity and power over all who are within the realm', because he has 'the material sword pertaining to the governance of the realm' and is responsible for the peace, so that 'the people entrusted to his care may live in quiet and repose'. He is above the law to the extent that, possessing the sanctions, he alone can correct himself, but the person with the power to cause the laws to be observed ought himself to observe them. The most resounding statements about the king are significantly in the tractate 'Of Actions',<sup>171</sup> where the different legal procedures and the courts which handle them are described. The king who is chosen to do justice to all men 'must surpass in power all those subjected to him', for 'it would be to no purpose to establish laws . . . were there no one to enforce them'. But again the king is seen to need a 'bridle': although the law is formally what 'pleases the prince', it has to be 'rightly decided with the counsel of his magnates, deliberation and consultation having been had thereon'. Bracton does not speak of the *status regis et regni*, but he describes the relationship which lay behind this concept: the king doing justice to all within the realm with the concurrence of his barons.

<sup>169</sup> The extensive literature on Bracton's theory of kingship may be represented by: F. Schulz, 'Bracton on Kingship', *EHR* 60 (1945); Kantorowicz, *The King's Two Bodies*, 143–92; B. Tierney, 'Bracton on Government', *Speculum*, 38 (1963); E. Lewis, 'King above Law? "Quod Principi Placuit" in Bracton', *Speculum*, 39 (1964); G. Post, 'Bracton on Kingship', *Tulane Law Review*, 42 (1967–8).

<sup>170</sup> *Bracton on the Laws and Customs of England*, ii. 109–10 (f. 34), 166–7 (f. 55b).

<sup>171</sup> *Ibid.* 305 (f. 107).

## CHAPTER SIX

# New High Courts and Reform of the Regime

IN THE middle years of the thirteenth century the reform of the ‘state of the king and the kingdom’ became the matter of politics, and led to the capping of the judicial systems of England and France by the new high courts of *parlement* and parliament. These were the creations of two long-lived kings, Louis IX (St. Louis, 1226–70) and Henry III (1216–72), who were linked by family as well as feudal connections (they married two sisters from Savoy), shared an ambition to distinguish themselves as crusaders, and faced the same challenge of extending justice to all their subjects through growing bodies of officials.

## COMPLAINTS AGAINST OFFICIALS

The crusade to the Holy Land on which Louis IX set sail in August 1248 was prepared more thoroughly than any other in Capetian history.<sup>1</sup> Concord had first to be established among the princes of Western Europe—with England even at the cost of returning to Henry some of the land John had been adjudged to have forfeited; and within France itself the *baillis* were mobilized to reinforce traditional forms of peace. In 1245 they were ordered to grant those who took the cross a three-year respite from their debts and to impose a five-year truce in all private wars. The king’s local agents were busier than ever as arbiters, and as enforcers of the bonds entered into by warring parties to keep peace-agreements.<sup>2</sup> The actions of the royal agents themselves inevitably came under scrutiny. Among orders to collect money, ships, and supplies for the great venture, Louis issued in January 1247 a new sort of commission directed neither to *baillis* nor to officers of the king’s household but to ecclesiastical inquisitors drawn mostly from the

<sup>1</sup> Jean Richard, *Saint Louis, Crusader King of France*, ed. and abridged S. Lloyd, tr. J. Birrell (Cambridge UP, 1992), chs. 5 and 6; W. C. Jordan, *Louis IX and the Challenge of the Crusade: A Study in Rulership* (Princeton UP, 1979).

<sup>2</sup> Jean de Joinville, *Vie de Saint Louis*, ed. N. L. Corbett (Quebec, 1977), 96 (§65); *Recueil des historiens*, 24, Les Enquêtes Administratives du Règne de Saint Louis, 302\*–\*303 (preuves de la préface, nos. 115, 118, 119), 316\* (no. 144).

Dominican and Franciscan orders, for the task was the correction of the abuses of royal government itself by its local agents. The redress of his subjects' grievances was part of Louis's crusading vow, without the fulfilment of which the enterprise could not be expected to prosper.<sup>3</sup>

Particular care was now being taken in the choice of *baillis*, who might be moved from one place to another, have temporary associates appointed, and see the boundaries of their *bailliages* adjusted to meet the demand for more effective government. A tract on princely rule written a hundred years later recalled how 'the holy king Louis' had been accustomed, as he went round the country, 'to bear at his girdle a pair of tables' on which to note the names of men he heard about who were 'good, true and wise' and convenient for office.<sup>4</sup> Royal *baillis* and *sénéchaux* were being appointed in the newly conquered areas in the south, even where the king had few personal domains: the importance of the great *enquête* of 1247–8 lay in its proclamation that the people of Carcassonne, Nîmes, and Beaucaire were equally citizens of the kingdom of France, whom the king would protect against his own officials if these acted unjustly.<sup>5</sup> As he departed for the crusade in 1249, Alphonse count of Poitou, the king's brother, appointed his own inquisitors for his appanage, which a month later was swollen by his succession to the county of Toulouse.<sup>6</sup>

Preparation for crusading stimulated domestic government: crusading itself was an interruption of the government, which was coming to be regarded as the king's main business. To this Louis returned in 1254 with a new dedication, as would his cousin Edward I of England from his crusade twenty years later. No doubt penitence for the sins which it was believed must have led the Seventh Crusade to its ruin in Egypt contributed to Louis's zeal for just rule. Jean de Joinville, the companion of the king in defeat and captivity, makes the latter part of his *Vie de Saint Louis*, one of the first saint's lives in the vernacular, a description of a new sort of royal sanctity, which combined the conscientious supervision of officials with a personal holiness that renounced silk robes and feather beds. Moving up from his landfall near Marseilles in July 1254, Louis sought, by restoring their liberties, to reconcile the cities of the south which still smarted from the bloody crusade mounted by the barons of northern France against the Cathar heretics. The *enquêtes*

<sup>3</sup> *Recueil des historiens*, 24, pp. \*3 ff.; F. Lot et R. Fawtier, *Histoire des institutions françaises au moyen âge*, ii. *Institutions royales* (Paris, 1958), 157; C.-V. Langlois, 'Doléances recueillies par les enquêteurs de saint Louis', *Revue historique*, 92 (1906), 3.

<sup>4</sup> *Four English Political Tracts of the Later Middle Ages*, ed. Jean-Philippe Genet, Camden 4th. ser. 18 (London: Royal Historical Society, 1977), 203.

<sup>5</sup> See *Recueil des historiens*, 24, p. 2\* for the territorial grouping of complaints.

<sup>6</sup> *Layettes du Trésor des chartes*, ed. A. Teulet et al., 5 vols. (Paris, 1863–1909), iii, no. 3796; *Enquêtes administratives d'Alphonse de Poitiers*, ed. P.-F. Fournier and P. Guebin (Paris, 1959).

into the abuses of officials were resumed, first in Languedoc, then in 1255 in the *bailliages* of Paris, Sens, and Amiens, and in subsequent years in Berry, Touraine, the Orléannais, Rheims, and Vermandois. The king remained constantly on the move, settling with the prelates and lay barons the division between his powers and their rights in what W. C. Jordan has called 'a spirit of compromise and decency, implying no sacrifice of legitimate prerogatives'.<sup>7</sup>

Joinville describes how King Louis, bearing himself after his return from *Outremer* 'with such devotion to Our Lord and so righteously towards his subjects', 'established a general establishment' to correct his baillies, provosts, and mayors.<sup>8</sup> An immediate influence on this *Grande Ordonnance* is likely to have been the complaints to the inquisitors. Alphonse's commissioners of inquiry in Poitou and Toulouse were described in the records as 'to reform the state of the land for the common advantage' (*statum terre ad communem utilitatem in melius reformare*);<sup>9</sup> Louis's 'general establishment', addressed to everyone in Languedoc and Languedoil, proclaimed itself to be made 'out of the obligation of royal power' to defend the peace and quiet of his subjects against the injuries of the wicked, and (again) 'to reform the state of the kingdom for the better'. That further legislation was envisaged is shown by the last clause of the edict, which reserved to the 'fullness of royal power' the 'declaration, alteration, and also correction, supplementation, or diminution of all the things said above'; and almost immediately provisions were added to what Louis said he had previously ordained 'for the reformation of the state of our lands'.<sup>10</sup>

The state to be reformed by this newly self-conscious legislation was the administration of the kingdom by the king's local agents. The communal oath to keep the peace was replaced by an oath required of the baillies, seneschals, and other officials 'of the [king's] court' to safeguard the rights of both king and people. The king himself undertook to punish baillies who defaulted on their sworn obligations, the baillies to punish miscreant provosts and mayors; if they failed, the shame of perjury would fall on all of them equally, since the oaths were to be taken 'in public assizes, before both clergy and laity' (cc. 1, 10, 11). At the end of his term of office every royal bailiff, great or small, must remain in his bailiwick for forty days to answer complainants in front

<sup>7</sup> Joinville, *Vie de Saint Louis*, 223 (§667); cf. Matthew Paris, *Chronica Majora*, ed. H. R. Luard, vol. v (London: Rolls Series, 1880), 465; Jordan, *Louis IX and the Challenge of the Crusade*, ch. 6.

<sup>8</sup> Joinville, *Vie de Saint Louis*, 229–33 (§693–§719); *Ordonnances des Roys de France*, i. 65–81; L. Carolus-Barré, 'La Grande Ordonnance de 1254 sur la réforme de l'administration et la police du royaume', in *Septième centenaire de la mort de saint Louis* (Paris, 1976), 91.

<sup>9</sup> *Layettes du Trésor des chartes*, iv, nos. 4174–5.

<sup>10</sup> Carolus-Barré, 'La Grande Ordonnance', 91–3.

of his successor (c. 31). *Baillis* and *sénéchaux* must swear not to offer bribes to royal councillors sent out on commissions of inquiry, or to their wives and families; not to sell or connive in the sale of royal offices or revenues, in particular to their own kin; and to correct subordinates who were oppressive, suspected of usury or openly leading wicked lives (cc. 6, 7, 8, 13, 24). To prevent his officers building up private interests in the *bailliages* to which they were appointed, Louis strictly forbade them to buy lands during their terms of office without his permission, or make marriages, or acquire ecclesiastical benefices for their children (13, 14). Only with the king's licence might his men seek entertainment in religious houses (c. 15). Without urgent cause *baillis* were not to impose a ban on the export of corn, wine, or other goods from their territories, but trading with Saracens was totally forbidden while they were fighting Christians. Louis's statute of 1230 against Jewish and Christian usurers was reaffirmed, and the blasphemies of the Talmud were condemned (cc. 32, 33). The general order of the kingdom was the subject of clauses demanding that prostitutes be expelled from communities stripped to their shifts and the houses sheltering them confiscated; forbidding games of checkers or dice; and restricting lodging in taverns to genuine travellers (cc. 12, 34–6).<sup>11</sup>

The heart of the *établissement* was the assurance that royal justice would operate in the interests of everyone in the land, 'great, middling and small', strangers as well as subjects (c. 2). A *bailli* must swear not to accept from litigants, for himself or members of his family, gifts other than bread, wine, or fruit worth less than ten sous in any one week, and not to borrow more than twenty pounds from anyone due to pursue a lawsuit before him; and oaths were required of judges, provosts, and mayors that they in particular would not make gifts to *baillis* or their relations (cc. 4, 5, 9). The serjeants *baillis* employed to execute court orders were to be restricted in numbers, and they were to be appointed in open court and carry proper authorization (cc. 17, 18). Criminals could ask to know the charges being investigated against them; persons of good repute, however lowly, must not be threatened with judicial torture to extract money from them; and fines must be imposed and assessed in public court for proven misdeeds, not extracted by terror or unfounded accusations (cc. 19, 23). To reduce crime without imposing labour and expense on the king's subjects, the *baillis* should try malefactors in their localities, and not move courts from their accustomed meeting-places (c. 25) No one should be disseised of his property without fault proved in court or the king's express order, and *baillies* and *seneschals* must impose no new monetary dues on their

<sup>11</sup> Richard, *Saint Louis*, 156–8; the numbering of the clauses is that given in *Ordonnances des Roys de France*, i. 65–81.



*bailliages* (c. 26). The costs payable to the court by the defeated parties in civil suits were to be limited to a tenth of the value of the property in dispute (c. 29).

Part of the original record of a royal inquest into the conduct of Matthew of Beaune, *bailli* of Vermandois from 1256 to 1260, survives to show with what effectiveness these regulations were applied. In 1261 special commissioners put a series of questions clearly related to the ordinance of 1254 to 508 persons who had had business with Matthew. The mayor of Chauny, who claimed to have been a jurat of that town for twelve years, said on oath that Matthew had always behaved well towards the townsmen; the people's law-suits had been expedited, and the mayor had heard no one complaining of the *bailli*. Nor did he know anything of gifts, services, or other favours that Matthew or his family might have received, apart from two or three jars of wine when he came to Chauny; the town had pressed a gift of forty pounds upon him, but he had repeatedly refused it. Questioned closely, however, the mayor told how the *bailli*'s household had complained of poor housing and been given four woollen blankets worth fifty shillings or more (for two clerks and two esquires), and at another time sixty shillings to divide between them. He swore that to his knowledge Matthew had not imprisoned anyone to extort money from them, but some of his colleagues on the town council told of a prisoner whom Matthew had said he would see hanged for homicide, but then released when he acknowledged a debt of fifty pounds: under questioning witnesses gave conflicting testimony as to whether the money was a bribe or for the expenses of an advocate and maintenance in prison.<sup>12</sup>

Before the commissioners at Soissons there appeared Simon de Rivier to charge Matthew with imprisoning him without reasonable cause and extorting ninety pounds for his release. The former *bailli* was in Soissons and came to tell the inquiry that the money had been a fine imposed for going about armed in contravention of a royal edict, and Simon was forced to admit that he had led a force of men, armed for their own defence, to mow a disputed meadow. The complaint was now that the fine had not been properly assessed by a court (cf. clause 23 of the *Grande Ordonnance*), a prior testifying that he and the other peers of the castellany of Pierrefonds had been unwilling to assess it because they had never seen such a fine before, and they did not know what the king and his council wanted. There was more testimony that Matthew's wife had refused gifts lest 'her husband should be cross with her'. An advocate 'who had been often at assizes' claimed that after he had repeatedly offered the *bailli* gifts and services on behalf of the lords

<sup>12</sup> Langlois, 'Doléances . . . de Saint Louis', 32-40; *Recueil des historiens*, 24, pp. 318\*-329 (preuves de la préface, no. 152), parts 1 and 7-17 for the evidence from Chauny.

whom he counselled, Matthew had told him 'not to come back again, if he loved him'. But others said that gifts the *bailli* had refused had simply gone to his wife or his clerks, and that he had threatened to throw one witness into 'the thieves' pit' (*fossa latronum*) if he gave evidence against him. The provost of Crépi-en-Valois described how he was with the *bailli* of Vermandois and other *baillis* and knights in the king's garden at Paris, when Matthew saw that the rest had finer drinking-cups than he, and sent the witness out to buy him one that should be the most beautiful of all.<sup>13</sup>

The commissioners seemed most concerned by the statement of the provost of Senlis that, whereas the assizes had been accustomed to meet every six weeks and the date of the next session would be announced at the end of a meeting, Matthew of Beaune had let nine or even ten weeks pass between sessions and notified the date for the assizes a mere eight or ten days beforehand. Asked what inconvenience this caused, the witness said that his bailiwick of Senlis was twenty leagues long and seven wide and there was too little time to inform a mass of litigants whose names and business he did not know, so that some lost their suits by default and others could not get their evidence and counsel into court. Asked how the *bailli* expedited pleas at assizes, the provost said that he sometimes held back the business of the poor and weak at the instance of the noble and rich; and that he allowed counter-pleas and the giving of pledges (for the later appearance of a defendant) in cases such as novel disseisin, violent or forceful injury, and suits supported by sealed deeds, in which they were not usually admitted, so that cases were endlessly delayed. The provost of Senlis also cited an occasion on which Matthew had failed to catch the people who were found to have burnt the haystack of a monastery in the king's custody and chased the monks with cries of *ad mortem, ad mortem!* In this, and other cases where he had left the injury (*delictum*) unpunished, the king had lost his fines.<sup>14</sup>

King Henry III visited Louis IX on his way home to England from his Gascon lands and saw the sights of Paris in the same month of December 1254 that the great ordinance was issued to reform 'the state of the kingdom' of France.<sup>15</sup> But earlier in 1254 and without need of a French example the English government had added to the questions which the justices asked about the conduct of sheriffs and their officers on their periodic eyres around the counties of England.<sup>16</sup> Even before

<sup>13</sup> 'Preuves', no. 152, parts 20, 23, 44, 59, 61, 72, 81, 134, 141, 198, 223–5.

<sup>14</sup> Ibid. no. 152, parts 55, 87, 240.

<sup>15</sup> Matthew Paris, *Chronica Majora*, ed. H. R. Luard, 7 vols. (London: Rolls Series, 1872–83), v. 477–83.

<sup>16</sup> The articles of inquiry before the justices in eyre at Lichfield in 1254 are given in the annals of the monastery of Burton: *Annales Monastici*, i, ed. H. R. Luard (London: Rolls

the first 'articles of the eyre' were drawn up at the end of the twelfth century, the Inquest of Sheriffs of 1170 had asked about people accused out of hatred or for reward and those whom officials let off in return for money. In 1224 justices were sent from the *curia regis* to hear complaints of the misdeeds of Fawkes de Breauté and his henchmen, who had been established in control of the midland counties by King John a decade earlier. A series of accusations was made to them that Richard Foliot, undersheriff of Oxfordshire, had imprisoned people unjustly in Oxford castle or extracted land, horses, and money by threatening imprisonment; in one case Richard and a fellow undersheriff were alleged to have taken from a man 'thirty quarters of hard corn and malt, six oxen, two cows, two horses, thirteen pigs, forty ewes and as many lambs, the flesh of twelve pigs with the lard, yarn for making a hundred ells of linen cloth, three of his wife's cloaks, three rochets, four shirts, two silk wimples and three linen ones, one brooch of gold and three of silver, three bushels of linseed, all his domestic utensils and all the iron-work of his plough, ten linen sheets, two blankets, two napkins, two towels and four pillows, and one silver mark', as the price of his not being put in prison.<sup>17</sup>

The articles of the eyre were at first concerned less with extortion by threats of imprisonment than with the escape of prisoners from custody and the king's consequent loss of felons' chattels. Then, probably for the eyre of 1239, a question was introduced concerning bailiffs who took bribes for removing recognitors from juries. For the eyre of 1246 there were new questions about 'sheriffs and bailiffs who fomented actions in order to gain lands, wardships or debts, whereby truth and justice are stifled', or 'took bribes with both hands, from one party and the other'; and about petty bailiffs who held ale-drinkings at the time of the greater half-yearly meetings of the hundred courts or extorted forced gifts of crops at the harvest season. In 1254 the justices were also to ask which sheriffs and bailiffs had taken money from those indicted of homicide or of theft to release them on bail, when such persons were not to be released without the king's express order; and which had taken money several times for one amercement, or had distrained several people with the same name for a fine when only one of them was 'in mercy'.<sup>18</sup> What

Series, 1864), 330-1; see C. T. Flower, *Introduction to the Curia Regis Rolls*, Selden Soc. 62 (London, 1944), ch. 7 for the role of the sheriff in local government.

<sup>17</sup> *Select Cases of Procedure without Writ under Henry III*, ed. H. G. Richardson and G. O. Sayles, Selden Soc. 60 (London, 1941), lv, 49-57 (esp. no. 35j); see *Curia Regis Rolls of the Reign of Henry III*, xvii (1242-3), ed. A. Nicol (London: HMSO, 1991), 16-17 (no. 53), and *Roll and Writ File of the Berkshire Eyre of 1248*, ed. M. T. Clanchy, Selden Soc. 90 (London, 1973), 381-2, for other typical examples of complaints against officials.

<sup>18</sup> For the development of the articles of the eyre, see H. M. Cam, *Studies in the Hundred Rolls*, Oxford Studies in Social and Legal History, ed. P. Vinogradoff, 6 (Oxford: Clarendon

these questions elicited can be seen at the session of the eyre in Shropshire in 1256: seven cases of the escape of thieves were presented there, compared with eleven of wrongful imprisonment by sheriffs or serjeants and of the taking of bribes ranging from 12d. to 16s. to let people go. The bailiff of Munslow hundred had taken a measure or half a measure of corn from several persons 'so that they should not be arrested' (*ne caperentur*). The jurors of Halesowen accused not a royal official but the abbot of Hales of imprisoning men of the township and letting them go again 'at his pleasure' (*pro voluntate sua*).<sup>19</sup>

In the 1250s Henry III's government was facing a crisis precipitated by the financial demands of the king's ambition to win the kingdom of Sicily for his younger son, but behind this lay a longer-term failure to keep order at home. The English system of writs and actions was founded on the work of the sheriff and shire court, no less than French justice was founded on what was done in the *bailliaiges* and assizes, but too often feudal lords and the new officialdom contested control of the localities at the expense of the people. In the seventeenth century the great lawyer Sir Edward Coke described this as 'the irregular time of Henry III' when great men took distresses 'of the beasts of their tenants or neighbours . . . to enforce the owners of the beasts for necessity to yield to their desire'.<sup>20</sup> The distraint of peoples' goods was a normal way of compelling them to appear in court, and lords were using it to make tenants come to their courts rather than the king's. An article added for the eyre of 1239 aimed to discover who had withheld suit (attendance at) shire and hundred courts without royal grant of the privilege, though perhaps by the consent of the sheriff or his bailiffs. In Shropshire in 1256 another of the charges against the abbot of Hales was that he prevented the men of Hales from taking pleas of replevin (seeking the return of distrained goods) to the county court and the king's bailiffs from freeing the distresses he had taken.<sup>21</sup>

The inquest was developed by the kings of England and France in the first place to enforce their own rights and discover offenders against their peace. The annals of the monastery of Burton which give the articles of inquiry before the justices at Lichfield in 1254 also list twenty-two questions asked by special commissioners sent out by Henry III at their session at Stafford in 1255. These are about the 'subtraction' by

Press, 1921), and *Crown Pleas of the Wiltshire Eyre, 1249*, ed. C. A. F. Meekings. Wiltshire Archaeological Society Records Branch, 16 (Devizes, 1961), 27–33.

<sup>19</sup> *The Roll of the Shropshire Eyre of 1256*, ed. A. Harding, Selden Soc. 96 (London, 1981), pp. xvi–xvii, 395.

<sup>20</sup> D. A. Carpenter, 'King, Magnates and Society: The Personal Rule of King Henry III, 1234–1258', *Speculum* 60 (1985), 50–1; A. Harding, *England in the Thirteenth Century* (Cambridge UP, 1993), 276–9.

<sup>21</sup> *Wiltshire Eyre*, ed. Meekings, 31–2; *Roll of the Shropshire Eyre*, 236 (no. 647).

prelates, magnates, and free tenants of the rights and liberties of the king, including the withdrawal of suit to county and hundred courts and the courts and mills of royal manors; the 'state' of the lord king's forests and parks; the value of the king's castles and of garrison duties in them; the custody and value of the chattels of Jews; liberties (rights of jurisdiction) exercised by landlords without royal charters; churchmen who had acquired fees held from the king, which thus ceased to owe the normal inheritance dues, or who compelled laymen to plead cases belonging to the crown in the church courts; and sheriffs and bailiffs who had permitted encroachments on the king's rights or extorted money by favouring malefactors—these things at any time since the eighteenth year of King Henry's reign (1234).<sup>22</sup>

PLAINTS AND THE REFORM OF THE STATUS REGNI

But the most important aspect of the sworn inquest into the king's rights was paradoxically its power to reveal the grievances of the wider populace, to whom it gave an alternative to the hazardous appeal of felony and the expensive writ for bringing injuries before the king's courts. Bracton knew of the *querela sine brevi*, a civil action which could be brought straight to the justices in eyre if there was no time to get a writ from the chancery. More significant as a force for change were the 'plaints' (*querelae*, *querimonie*) of the victims of violence or official misconduct, which sometimes thrust themselves into the *veredicta*, the written answers of the presenting juries to the articles of inquiry of the eyre, and must have been their main source of information. Examples are the complaints against Fawkes de Breauté and his men to the inquiry of 1224; the report in the jury of the city of Canterbury's *veredictum* at the eyre of 1241 that 'Hamo le Queller complains [*queritur*] that Walkelin the Gaoler and others came to his house by night and broke down his doors and wounded, beat and maltreated him'; and the simple statement in a Shropshire *veredictum* before the eyre of 1256 that six men of Halesowen 'complain of' (*queruntur de*) the abbot of Hales.<sup>23</sup>

In France complaints were evoked on a far greater scale by the inquiries against the rapidly growing corps of officials which was required to govern the enormously expanded realm, and there the

<sup>22</sup> *Annales Monastici*, i. 337–9.

<sup>23</sup> *Select Cases of Procedure without Writ*, 49–57, 67; A. Harding, 'Plaints and Bills in the History of English Law, mainly in the period 1250–1350', *Legal History Studies* 1972, ed. D. Jenkins (Cardiff: U. of Wales P., 1975), 66–8, 83; *Roll of the Shropshire Eyre*, 236–7; in 1236–7 Henry III mounted an inquiry into complaints of abuse by his officials at Bordeaux: see *Enquêtes administratives d'Alfonse de Poitiers*, p. xxi.

normal practice was for the inquisitors to question each *juratus* individually rather than to obtain 'verdicts' from juries of presentment.<sup>24</sup> The general inquest of 1247 was the turning-point in the development of French justice because it was instructed to listen to anyone in the realm, 'whoever they might be', who had grievances against King Louis himself, his predecessors, or his bailiffs, provosts, foresters and serjeants and their households. The inquisitors were 'to hear, write down and investigate simply and summarily' complaints (*querimonie*) of injuries, exactions and improper receipt of services by the king's officials, and order the latter or their heirs to make restitution where, by confession or proof, it was found to be due.<sup>25</sup>

The 551 *Querimonie Normannorum* recorded in 1247 reveal much about the duchy's integration into the realm. More than a hundred of the complaints arose from the loss by Norman monasteries of English property after the separation of the duchy from the kingdom of England in 1204, or from the French king's confiscation of the lands of Anglo-Norman barons. Only now was there an opportunity to seek justice for many of the dependants and tenants who had been deprived of their inheritance 'from the time of the conquest of Normandy' because their kinsmen or lords had chosen England. Other grievances originated from the siege of the rebel-held castle of Bellême by royal troops in 1229: monks complained of the besieging army's plundering of their wood, laymen of penalties imposed on them although they had no part in the rebellion.<sup>26</sup>

In the south of France complaints to the *enquêteurs* were often that the king unjustly retained lands taken in the crusades against the Albigenian heretics. Some said they had been victimized simply because they happened to have houses in Carcassonne in 1240, at the time of its betrayal to Raymond Trencavel, the rebellious *vicomte* of Béziers. Others claimed to have been dispossessed for participation in the 'war of the count of Montfort' (the leader of the crusaders from 1209 to 1218). One complainant was met with evidence that her husband's father had been burnt at Toulouse as a heretic (the witness claimed to have been in the town, but had preferred not to watch), and that the complainant herself had been implicated in 'the war of the vicomte'.<sup>27</sup>

<sup>24</sup> *Les Registres de Philippe Auguste*, i. 150-3, 172-3 (nos. 92, 94, 113); the life of Saint Louis by Queen Margaret's confessor, in *Recueil des historiens*, 20, ed. Daunou and Naudet, 119.

<sup>25</sup> *Layettes du Trésor des chartes*, 5, no. 490.

<sup>26</sup> C. Petit-Dutaillis, '*Querimoniae Normannorum*', in *Essays in Medieval History Presented to Thomas Frederick Tout*, ed. A. G. Little and F. M. Powicke (Manchester UP, 1925), 107-10; the complaints to the inquisitors of 1247 and subsequent years are edited by Delisle in *Recueil des historiens*, 24: see pp. 1-73 for the Norman complaints, and for this paragraph, nos. 40, 46, 47, 49, 76, 78, 84, 135, 152, 274 etc.

<sup>27</sup> *Recueil des historiens*, 24, pp. 300 (no. 5), 308 (no. 36), 541-4, 585 (no. 563).

The primary purpose of the inquests of 1247 was to restore those unjustly disinherited by Louis or his predecessors in these political troubles, so that the king could go on crusade with a clear conscience. Many items in the register of Norman complaints begin *conqueritur de domino rege*, but the real targets were of course the king's local agents. In Touraine, Poitou, and Saintes, the great majority of the 1938 complaints made in 1247–8 are grouped in the register against the names of two hundred or so officials (for instance, 186 are headed 'against Philip Coraut, castellan of Tours', and 254 'against the provost of Chinon'). In other parts of France grievances were arranged by their place of origin, but tell the same story of a vastly extended hierarchy of royal agents using their new-found authority for their own ends. Typical offences of the new men were: the imposition of unaccustomed harvest works by a farmer of royal land; the commandeering by the royal castellan of Alès of a mule which was worked so hard that it died within eight days of its 'repatriation'; and the assisting of criminals, debtors, and litigants by officials generally, in return for money needed to recover the costs of buying office in the first place.<sup>28</sup>

Two recurrent features of the complaints throughout France—that they came from communities and charged officials with violence—are combined in the *querela* of the consuls of Alès for themselves and the whole body of townspeople (*pro se et universitate*) that during his seneschalcy Peter Faber evicted men and women from their homes, seized cloth from workers, kept forty or more persons captive for two weeks, and by violence took almost a thousand pounds of money of Vienne from the town, which should by custom be free of all taxes. Alès asked to have its money back, and the *universitas* to be restored to its proper 'state'.<sup>29</sup> Parishes complained through their leading men that the king's officers had deprived them of their pasture rights or their markets, and deaneries that the provost of Falaise taxed clerks on their purchases for themselves and their churches as though they were villeins. The commonest complaints of all were that officials held to ransom the people they arrested and maltreated on charges ranging from homicide to brawling and abusive language or even for no cause (*nullam causam praetendentes*). At Beaucaire Bernard Gondelenus asserted that a former seneschal had taken fifty marks from him for allegedly robbing a Jew and drawing his sword against a Christian in the public street—this quite arbitrarily, 'putting aside all judicial procedure and hearing by a judge'.<sup>30</sup>

<sup>28</sup> Ibid. 24, pp. 3 (no. 11), 6 (no. 31), 15, 32 (no. 253), 36 (no. 275), 48, 116–33, 195–211, 243, 388 (no. 9); Langlois, 'Doléances', 21 ff.; Petit-Dutaillis, '*Querimonie Normannorum*', 115.

<sup>29</sup> *Recueil des historiens*, 24, pp. 386 (no. 1).

<sup>30</sup> Ibid. 28 (no. 222), 30 (no. 236), 53 (no. 395), 291 (no. 124), 386 (no. 1), 441 (no. 1), 483 (no. 126).

The inquiries of 1247 exposed to public criticism an administrative culture which habitually overrode the customary rights of communities and individuals and changed the force of law into a self-serving violence. This was a culture, moreover, in which a man fleeced by a Norman *bailli* of two hundred pounds *Tournois* on an allegation of usury of which he was cleared at an assize could be told that it was vain to try to get his money back once it had been accounted for at the royal treasury;<sup>31</sup> and a merchant could find his mule train of a hundred animals seized by the seneschal of Beaucaire for simply threatening to complain about him to the king of France.<sup>32</sup> Louis IX seems to have been brought to understand that the unification of the widening kingdom required a guarantee of justice to everyone in it against such misuses of power by anyone in authority. The life of King Louis by Queen Margaret's confessor thought of 'the state of the king' in terms of the just rule of his subjects, manifested by the sending out of inquisitors to discipline local administrators; of the parallel investigation of the state of his household (*statum familiae domus suae*); and his own wise and plain-spoken judgments, which avoided oaths and relied on the simple authority of his name.<sup>33</sup>

The confessor was writing at the very end of the thirteenth century, but documents from the crisis of 1258–65 in England show that the 'state' of a king was already understood as the quality of his rule, and was seen to be vital to 'the state of the kingdom'. Despite the disaster in Egypt, Louis returned from crusade the greatest king in the West, while Henry was being dragged into political crisis by the expense of his ambitions. When he called an assembly of the prelates and magnates to London in April 1258, Henry was told that if he would 'reform the state of his realm . . . they would loyally use their influence with the community of the realm so that a common aid would be granted' for the Sicilian project; and on 2 May the king swore 'that the state of the realm should be put in order, corrected and reformed' by twelve men of his council and twelve elected by the magnates, who were to meet together at Oxford one month after Whitsun. It is tempting to see an imitation of King Louis's inquisitions in the barons' first reform, the appointment of one of their number, Hugh Bigod, to be 'justiciar of England' (previous justiciars had been 'of the king'), and the swearing of him to 'show justice to all making complaint (*omnibus querelantibus*) without faltering 'in this for the lord king or the queen, or for their sons, or for any living person or for any thing, nor from hate nor love, nor prayer nor payment'. The Provisions made at the Oxford parliament of

<sup>31</sup> *Recueil des historiens*, 15 (no. 96).

<sup>32</sup> *Ibid.* 507 (no. 231).

<sup>33</sup> *Ibid.* 20, p. 400.



1258 began by ordering that four knights should be chosen in each county to attend every day in the county court, 'hear all complaints of any injuries and trespasses whatsoever, done to any persons whatsoever by sheriffs, bailiffs, or any other persons', and to remand the accused until 'the first visit of the chief justiciar to those parts' to determine the complaints hundred by hundred.<sup>34</sup>

It became apparent in course of the preparation of the second stage of the reform, which lasted from the summer of 1258 until the Provisions of Westminster were promulgated in the autumn of 1259, that indiscriminate distraint of knights and freeholders to attend the courts of the magnates was as much of a grievance as the compulsion of 'archbishops, bishops, abbots, priors, earls, barons, monks and women' to attend the sheriffs' tourns when the business did not specifically require them.<sup>35</sup> On his eyre Bigod heard the usual stories of the ransoming of indicted men by shire officials and complaints of sheriffs who held more tourns than were accustomed and shifted the meeting-place of the county court of Surrey from Leatherhead to Guildford, but also the grievances of the men of Witley, who claimed that Peter of Savoy, the queen's uncle, had increased the rents they paid as tenants of ancient demesne of the king, and the charge of 'the king's men of Norbiton' that the bailiff of the chancellor of the bishop of Salisbury infringed their common rights. The 'whole community of the township of Southwark' complained of the billeting of men and the seizing of flesh, fish, and other supplies within the township by Edward, the king's eldest son.<sup>36</sup>

The wrong-doing of 'aliens, courtiers, and nobles and their bailiffs' and the failure of the king's judges to give justice against them, for they were nearly all 'placed and kept in their offices by the influence of these men', were high among the 'grievances by which the land of England was oppressed, and on which the state of that kingdom needed to be reformed': so the barons told King Louis in January 1264 when they sought redress from him as King Henry's overlord.<sup>37</sup> Their problem was how to bring about the reform of 'the state of the king' on which they saw the 'state of the kingdom' to depend. King Louis had indeed ordered the reform of his own court, but he was bound to find against vassals who tried to force reform on a consecrated king, and likely to listen sympathetically to a brother-in-law who understood 'the restora-

<sup>34</sup> *Documents of the Baronial Movement of Reform and Rebellion 1258-1267*, selected by R. E. Treharne, ed. I. J. Sanders (Oxford: Clarendon Press, 1973), 90-1, 98-9, 112-15; Harding, *England in the Thirteenth Century*, 283 ff.

<sup>35</sup> *Documents of the Baronial Movement*, 134-5, 138-41; *Select Cases of Procedure without Writ*, 85-98.

<sup>36</sup> E. F. Jacob, *Studies in the Period of Baronial Reform and Rebellion, 1258-1267*, Oxford Studies in Social and Legal History, ed. P. Vinogradoff, 8 (Oxford: Clarendon Press, 1925), 36-125.

<sup>37</sup> *Documents of the Baronial Movement*, 272-3.

tion of the state of the king and the kingdom' in a different sense. In the summer of 1258 the barons embarked on 'great and difficult arrangements' for the reform of the state of 'the Lord Edward's household (*de statu hospicii ipsius*) and the household of the lord king', and the Provisions of Oxford prescribed thrice-yearly meetings of parliaments 'to review the state of the realm and to deal with the common needs of the realm and of the king together'.<sup>38</sup> But in April 1261 Henry obtained a papal bull absolving himself and others from the oaths they had taken to the provisions 'under the pretext of reforming the state of the realm': to rational minds it was absurd, said Pope Alexander, that princes, who were the lords of laws, should be constrained by the will of their subjects—it was as though a woodsman was turned on by his own axe.<sup>39</sup> Inevitably, King Louis decided in January 1264 that Henry should be restored to 'unbridled authority' (*liberum regimen*) and 'that same state and fullness of power . . . that he enjoyed before this time'.<sup>40</sup> In June 1264, after their capture of Henry and Edward at the battle of Lewes, Simon de Montfort and his allies made one more attempt *ad reformationem status regni Anglie*, compelling the king to accept the advice of a baronial council on the appointment of the justiciar, chancellor, and treasurer, and of officials great and small 'for all those things which concern the government of the court and of the realm (*regimen curie et regni*)'. In March 1265 Henry swore for the last time to observe the peace made with the barons *super nostro et regni nostri statu*.<sup>41</sup> In August de Montfort's defeat and death at the battle of Evesham brought the baronial attempt to control the king to an end.

#### THE BILL REVOLUTION AND PARLEMENT

The inquiries into the abuses of royal officials focused the realm upon the ruler in a new way and spurred the emergence of the new high courts called parliaments. Arrangements for the central determination of *causas querelancium* were included in Frederick II's *constitutio pacis* of 1235,<sup>42</sup> but in Germany there were neither the imperial officials in the localities nor the travelling royal inquisitors to provide the constituent elements of a judicial system. In France and England, however, the inquiries of 1247 and 1258 marked a permanent change in the way justice was administered.

Kings continued to mount special inquests into the conduct of their administrators. The inquiry of 1261 into the behaviour of Matthew de

<sup>38</sup> *Documents of the Baronial Movement*, 94–5, 111.

<sup>39</sup> *Ibid.* 218–19, 236–7, 240–7.

<sup>41</sup> *Ibid.* 294–301, 308–9.

<sup>40</sup> *Ibid.* 288–9.

<sup>42</sup> See above, p. 97.

Beaune, *bailli* of Vermandois, appears to have been one of a series 'for the correction of officials'. In 1298, for instance, protests from the people of the Toulousain are reported to have caused Philip IV to instruct the dean of Saint Martin's, Tours, the archdeacon of Bruges, and Geoffrey of Vendôme, knight, to investigate the methods used by the senior officials sent only the previous year to raise money for the king; and two of the provincial charters of liberties granted by Louis X in 1315, those to the inhabitants of Normandy and of Champagne, promised to send out inquisitors every three years.<sup>43</sup>

The great change in legal procedure came as plaintiffs took to submitting their complaints in writing and directed them against others beside officials. Some may have been doing this from the beginning of the *enquêtes*, but for the general inquiries of 1247 it was necessary to enlist the local clergy to collect and write down 'each and everyone' of the *petitiones et querimonie*.<sup>44</sup> Among the records of the king's court there survive, however, a number of original letters submitted to the 'lords inquisitors' in which people from Carcassonne denounce unreasonable dispossession and violent extortion by royal bailiffs during 'the war of the vicomte', and appeal to 'the king's majesty' that, 'having God before his eyes and moved by piety and mercy', he will restore their property. The fact that the complaints made against Geoffrey de Roncherolles, the *bailli* of Vermandois, in 1269 are recorded in the plaintiffs' French rather than the clerks' Latin suggests that they are based on written petitions.<sup>45</sup> Thus, burgesses of Compiègne address themselves in their vernacular to the 'Segneur enquesteur, especiaument envoie de par noble homme Looys, roys de France, por les torfez amender' and 'a fere droit a chaucun, ausinc au povre quant au riche'.<sup>46</sup>

From the first Frankish charters until the middle of the thirteenth century, justice in the king's court was set in motion by royal acts conferring property and protection and demanding explanations from any who infringed royal grants. But only aggrieved churches and substantial landowners were in a position to get writs from the chancery ordering sheriffs to initiate legal procedures. The acceptance of oral complaints passed the initiative to wider social groups, and a stream of written complaints or 'bills' began to flow in the reverse direction, from the localities to the *curia regis*. Joinville paints a famous picture of St. Louis sitting after mass at the foot of his bed, or in his Paris garden, or with

<sup>43</sup> C.-V. Langlois, 'Doléances recueillies par les enquêteurs', *Revue Historique*, 100 (1909), especially 68–9, 81–2; id. on the Toulousain inquiry in *Revue Historique*, 95 (1907); Lot and Fawtier, *Institutions royales*, 158.

<sup>44</sup> *Recueil des historiens*, 24, p. 301.

<sup>45</sup> Ibid. 386, 698 ff.; *Layettes du Trésor des chartes*, iii. 19, 572–4 (no. 3627, i–vi).

<sup>46</sup> *Recueil des historiens*, 24, p. 700 (no. 110).

his back against an oak tree in the wood of Vincennes, gathering his councillors around them, and hearing 'the Pleas of the gate' (*de la Porte*) which 'are now [that is, early in the fourteenth century] called the Requests'. Anyone with a case in hand could present it to the king without hindrance by ushers or others, and he would detail one of his court to look into it.<sup>47</sup>

The king was going far beyond his traditional jurisdiction as feudal suzerain. The queen's confessor describes the trial of Enguerrand de Coucy, of so great and ancient a family that his sister could marry Alexander II king of Scots, who had hanged three boys for poaching on his land, without legal process (so their relatives complained) and though they had with them no dogs or equipment for catching wild animals. Louis shocked the nobility when, after 'sufficient inquiry', he sent his knights and serjeants to imprison de Coucy at the Louvre. The magnates declared that de Coucy should not and would not be subjected to an inquest in a matter touching his person, honour, and heritage, but would defend himself by battle. The king replied that in cases concerning the poor, churches, and people otherwise deserving of pity, 'the law of battle' did not apply; once he understood God's will in the case, neither nobility of lineage nor the power of the accused's friends would prevent him from doing justice. With the advice of his councillors he then sentenced de Coucy to forfeit the high justice which he had abused, along with the land on which he had offended, and ordered him to pay a ten thousand pound fine, create three chantries for the souls of the hanged boys, and go on a crusade. The king treated the defence of Enguerrand de Coucy as a conspiracy against the realm. He denied that he would hang barons, as the word was going round, but he would not hesitate to punish them if they did wrong, including his own brother Charles, count of Anjou and the eventual king of Sicily, if he gave bad justice and failed to pay his debts to merchants, for there could be only one king in France.<sup>48</sup>

Inquests were ordered to remove cases from seignorial courts where the local influence of the parties was too unequal to allow justice to be done, and the count of Joigny was brought before the king 'in a full *parlement*' (*en un plein parlement*) and sent to the Châtelet prison when he allowed a burgess he had caught thieving to die in his custody before due process.<sup>49</sup> Originally just a word for a notable assembly or 'parley', especially of king and barons, *parlement* was taken over as the name of the newly professional law-court which complaints to the king

<sup>47</sup> Joinville, *Vie de Saint Louis*, 94–5 (§57–§59); Q. Griffiths, 'New Men among the Lay Counselors of Saint Louis', *Medieval Studies*, 32 (1970), 240–1.

<sup>48</sup> *Recueil des historiens*, 20, pp. 113–15; Richard, *Saint Louis*, 212–14.

<sup>49</sup> *Recueil des historiens*, 20, p. 118C.

called into existence within the royal household. There is record of the expenses incurred by the towns of Beaumont and Pontoise as the king passed through them at Michaelmas 1239 'on the way to *parlement* at Paris' (*ad pallamentum Parisius*).<sup>50</sup> Though in 1252 an arbitration was made 'before the masters of the court of the king' *en parlement* at Pontoise, *parlements* usually met in Paris and at terms which were settled and known in advance—surely so that plaintiffs who could not get satisfaction from the travelling *enquêteurs* (perhaps because their grievances did not involve administrative wrong-doing) might bring their complaints to a final court of appeal that did not move around with the king. After 1255, when reports of cases in the Paris parliament become available, sessions of the court can be seen to take place normally at Candlemas, Whitsun, and the feast of All Saints—in 1262 there was 'no parliament at Pentecost because of the marriage of the lord Philip, the king's son, made at Clermont'—and before the end of St. Louis's reign a 'chamber for pleas' already existed in the royal palace on the Île de la Cité. By 1300 *magistri* could be said 'to hold parliament' there, and were soon transacting some business throughout the year, including vacations. Repeated meetings had merged to become a permanent institution.<sup>51</sup>

As royal justice tightened over them in the early years of the thirteenth century, the great lords claimed that they should be tried only by their peers, not by royal ministers. But in *parlements* complaints were received, inquiries conducted, and judgments on them given by the new class of royal servants, which largely excluded the magnates and was also distinct from the travelling *enquêteurs*. While the latter were mostly friars whose horizons were nationwide, the councillors in parliament were a mixture of royal knights and secular clergy from the towns of the old Capetian domains, experienced royal administrators (the very people against whom complaints of administrative abuse were levelled) brought up on a customary law which was only slowly penetrated by the Roman law taught at Orleans. There is a list of the 'councillors of the lord king of France' present in the *parlement* of Paris, in 'the king's house', before whom the prior of Saint-Martin des Champs appeared in February 1253 to exhibit a charter of privileges granted by Louis VII and obtain the return of two of the convent's serfs, arrested for homicide by the provosts of the city: they were the archbishop of Bourges, the bishops of Paris and Évreux, five clerical *magistri*, Geoffrey de la

<sup>50</sup> H. G. Richardson, 'The Origins of Parliament', in *Essays in Medieval History*, ed. R. W. Southern (London, 1968), 146–7.

<sup>51</sup> C.-V. Langlois, *Textes relatifs à l'histoire du parlement* (Paris, 1888), 36, 174, 178, 229–34; id., 'Les Origines du parlement de Paris', *Revue Historique*, 82 (1890), 95; Lot and Fawtier, *Institutions Royale*, 332 ff.

Chapelle, a knight who was a central figure in the king's court at this time and pronounced the judgment for the convent, another knight, and the *baillis* of Étampes, Orleans, and Caen, along with two provosts of Paris.<sup>52</sup> In the following year, the king being still 'in overseas parts', a case was heard by 'master John de Aubergenville, bishop of Évreux', Geoffrey de la Chapelle, 'master Stephen de Montfort of Orleans', and two other masters, all described as 'masters of the court of France and councillors of the said lord king'.<sup>53</sup>

Of course there was continuity between the arbitration service long provided by the king's court and the judging of the masters at *parlements*, and the jurisprudence of these *magistri* might amount to no more than the advice given to the king in 1254, against the pleas of the queen and others, that justice demanded that a noblewoman convicted of murdering her husband should be burned in public.<sup>54</sup> Roman law inspiration hardly seems necessary for Louis's famous ordinance, variously dated to *parlements* of November 1258 and February 1261, that proof by witnesses should replace trial by battle throughout his domains: it reads like a set of practical instructions to the officials of his domain, extending an order of about 1254 to the *prévôt* of Paris, rather than general legislation.<sup>55</sup> The earliest collections of French customary law outside Normandy, Pierre des Fontaines' *Conseil a un ami* and the *Livres de Jostice et de Plet*, both from the 1250s, attempt (as did 'Bracton' at a similar date in England) to follow Roman law models, but their value lies in their account of the actual practices of the courts of Vermandois and the Orléannais and their indication of the ways in which the *baillis* attracted appeals from lower officials and from the seignorial courts (for instance, in cases where the widening social differences between litigants made trial by battle manifestly unjust) and fed the most serious cases through to the *parlements*.<sup>56</sup> Pierre des Fontaines was a *bailli* of Vermandois who became a 'linchpin' of *parlements*; Philippe de Beaumanoir, author of the leading French law-book of the thirteenth century, *Coutumes de Beauvaisis* (c.1283), was the son of the Count of Artois's bailiff for the Gatinais and himself at various times royal *bailli* of Vermandois and seneschal of Poitou and the Limousin, his great work reflecting the extent of such an official's

<sup>52</sup> Langlois, *Textes*, 39–40 (xxiv), 43–5 (xxvii–xxviii), 62–3 (xxxviii, xl); id., 'Les Origines', 85–6; Griffiths, 'New Men'.

<sup>53</sup> *Recueil des historiens*, 24, p. \*315(141); Langlois, 'Les Origines', 88–91.

<sup>54</sup> *Recueil des historiens*, 20, p. 116C–D.

<sup>55</sup> *Ordonnances des Roys de France*, i, 86–93; Langlois, *Textes*, 40–2 (xxv), 45–8 (xxx); Lot and Fawtier, *Institutions royales*, 316–20, 426; Robert Bartlett, *Trial by Fire and Water* (Oxford: Clarendon Press, 1986), 124–5.

<sup>56</sup> Langlois, *Textes*, 37–9 (xxiii); Lot and Fawtier, *Institutions royales*, 310, 324, 428; Griffiths, 'New Men', 218 ff., 258.

business with *parlements*.<sup>57</sup> *Baillis* and *sénéchaux* were the founders of the French legal system, because the *bailliages* were not royal estates but units of the kingdom made up of both royal and private castleries, and the office of *bailli* was a permanent reminder of the king's hand over everyone, 'chastelain, vavasor, citaen, vilain'.<sup>58</sup>

For Beaumanoir the king's court is simply the last resort for vassals who fail to obtain justice from their own lords and successive overlords, proceeding there 'from degree to degree', since 'all lay jurisdiction in the realm is held from the king as a fief or rear-fief'.<sup>59</sup> But the records show how much the king's feudal jurisdiction was reinforced by the *parlement*'s supervision of the activities of *baillis* and *enquêteurs*. *Parlement* was the court for appeals from their decisions, and petitions against officials and others which it received directly it might refer to the *baillis* and *sénéchaux* for inquiry. According to the Queen's confessor, Saint Louis was accustomed, for the sake of peace, to increase the sentences imposed by the *baillis* in criminal matters, and in 1281 the king's council ordered those deputed to inquire into the misdeeds of reeves, serjeants, foresters, and such-like to leave punishment to the king's court.<sup>60</sup> On the other hand, an ordinance of 1276 attempted to keep the interrogation of witnesses before the *baillis* and *prévôts*, and away from *parlement*, 'as has been the custom hitherto'.<sup>61</sup> The first comprehensive set of *établissements* for the conduct of the court, issued at the Candlemas *parlement* of 1278, began with an order that to expedite its proceedings no cases should be heard there which might or should be taken before the *baillis*, and (c. 26) specifically allotted to them the determination of the frequent complaints of novel disseisin.<sup>62</sup>

The records of *parlement* show its gradual evolution from the administrative expedients of the king and his council into an organized law court with sovereign jurisdiction. Jean de Montlucon, the clerk responsible for making the 'official' roll of each session's judgments, began to compile the first registers of the court's proceedings ('Olim') retrospectively in 1263, perhaps intending them to be (like the English *Year Books*, which commence a little later) tools for advocates and councillors working in *parlement* and needing instruction in its practice. Jean separated the cases into sections of *Inqueste*, where the issues were decided by *enquêtes*, and of *Arrestaciones*, where matters were

<sup>57</sup> Philippe de Beaumanoir, *Coutumes de Beauvaisis*, ed. A. Salmon, i (Paris, 1899), pp. vii–xi.

<sup>58</sup> B. Guenée, *Tribunaux et gens de justice dans le bailliage de Senlis (1380–1450)* (Paris, 1963), 66–8.

<sup>59</sup> Beaumanoir, *Coutumes de Beauvaisis*, i. 37 (§44), 41–2 (§54), 158 (§322).

<sup>60</sup> *Recueil des historiens*, 20, p. 118.

<sup>61</sup> *Les Olim, ou Registres des arrêts rendu par la Cour du Roi*, ed. Comte Beugnot, ii (Paris, 1842), 74 (ix), and cf. 188–9 (l); Langlois, *Textes*, 94 (lxx); id., 'Les Origines', 88–91.

<sup>62</sup> Langlois, *Textes*, 95–9 (lxxii).

concluded by the court's *arrêts* (judgments).<sup>63</sup> Under the developed procedure suits began with the plaintiffs' *requêtes*, which Philip IV's parliamentary ordinance of 1291 appointed a notary and three masters of his council (who were not to be *baillis*) to scrutinize. Sitting from sunrise to mid-day in the great hall of the king's palace the masters of requests might decide straightforward matters themselves, but usually issued 'letters of justice' to bring cases to parliament for full hearings, or direct them to the courts of the provost of Paris, a *bailli* or a seneschal. Cases appealed to *parlement* from the bailliages and (in great numbers) from the provost of Paris sitting at the Châtelet were also first considered in the *Chambre des Requêtes du Palays*. All the great cases of the kingdom were pleaded in the *Grand Chambre* of *parlement*, staffed for the July session of 1316 by four presidents (the archbishop of Rouen, the bishop of Saint Malo, the count of Burgundy, and the constable of France) and thirty-one masters (fourteen clerics and seventeen laymen), for the most part long-time royal councillors. When pleading reached a stage at which evidence needed to be considered, cases were referred to the *Chambre des Enquêtes* to which four councillors (a dean, an archdeacon, a castellan, and a knight) were appointed in 1291. The findings of this chamber had to be approved and turned into *arrêts* by the *Grand Chambre*, which kept under its own control inquests concerning serious crimes and issues of inheritance and personal honour.<sup>64</sup>

A legal system capable of embracing all France was knitted together by *parlements*. The size of the country makes this achievement of its thirteenth-century kings quite as remarkable as Henry II's in the more compact kingdom of England. The *parlement* of Paris adjudicated on the liberties, including the judicial liberties, of the lords (both lay and ecclesiastical) and of communities, and by 1270 it had a procedure for getting the local customs relevant to a case certified in writing. At the Martinmas *parlement* of 1258 an inquest was held into the grievances of the Norman bishops, who petitioned the king for the rights of themselves and their men 'according to the ancient general custom of Normandy': some articles received the response that 'it should be done to the bishops as they ask', while others were answered by a demarcation of the respective roles of bishop and *bailli*, for example in the confiscation of the goods of deceased usurers and in the trial of disputes

<sup>63</sup> *Les Olim*, i, ed. Comte Beugnot (Paris, 1839); Langlois, 'Les Origines', 92–3; id., 'Nouveaux Fragments du Liber Inquestarum', *Bibliothèque de l'École des Chartes*, 46 (1885).

<sup>64</sup> Langlois, *Textes*, 156–9 (cxi); P. Guilhermoz, *Enquêtes et procès: Étude sur la procédure et le fonctionnement du Parlement au XIV<sup>e</sup> siècle* (Paris, 1892); Lot and Fawtier, *Institutions royales*, 335–8, 341–8, 387, 411, 413–14; J. R. Strayer, *The Reign of Philip the Fair* (Princeton UP, 1980), 208–36.



over property which was not clearly 'free alms' or 'lay fee'.<sup>65</sup> *Parlement* sent councillors to sit in the exchequer at Rouen, which was brought to accept, after due consideration, its judgments concerning Normandy; and also, after the heiress of Champagne married Philip IV, to exercise sovereign jurisdiction in *Grands Jours* at Troyes. *Parlement* also acted as the court of appeal from the *Grands Jours* of the *apanages*, the great lordships given to the younger sons of the royal line.<sup>66</sup> For his inheritance in Poitou and Languedoc, Louis's brother Alphonse had his own *parlement* to settle the disputes of his barons, judge demands for restitution by officials previously handled by *enquêteurs*, and hear appeals from the seneschals' courts. The jurisdiction of this *parlement*, which sometimes met at the count's Paris headquarters but came to be known as 'of Toulouse', was preserved in reduced form by delegation from the *parlement* of Paris after Alphonse's death and the full absorption of the Toulousain into the kingdom.<sup>67</sup> At the end of the middle ages *parlements* for Bordeaux, Burgundy, Brittany, the Dauphiné, Provence, and Normandy (in this case, under the old name of the Exchequer of Normandy) took their place beside the *parlement* of Toulouse. These provincial *parlements* incurred the jealousy of the *parlement* of Paris, though it had a considerable part in setting them up, but they were the only means by which the king could fulfil his responsibility for justice in a large realm which was expanding further.<sup>68</sup>

*Parlement* showed how a high court could be the key institution in state-formation. It is true that at times of national turmoil such as the sixteenth-century wars of religion and the seventeenth-century *frondes* the provincial *parlements* too easily became representatives of regional particularism, and politically the *Parlement* of Paris might seem most notable for its rivalry with the *Grand Conseil* and the rather negative resistance to royal policies which helped to destroy it after five centuries. Yet at the beginning, its judicial procedures were simultaneously the administrative channels without which the king's government could have done nothing. The rise of *parlement* and of the *baillis* was a single process.<sup>69</sup> By the end of the thirteenth century *bailliages* and

<sup>65</sup> *Les Olim*, i, 59–63, 77 ff.; Langlois, *Textes*, 79 (lviii), and cf. 101–2 (lxxiv); Strayer, *Reign of Philip the Fair*, 196–7, 206–7.

<sup>66</sup> *Recueil des historiens*, 24, 'preuves', pp. \*343, 356\*; Lot and Fawtier, *Institutions royales*, 336, 440.

<sup>67</sup> *Enquêtes administratives d'Alfonse de Poitiers*, xlviii–xlix; Langlois, *Textes*, 155–6 (cx), 159 (cxii).

<sup>68</sup> Lot and Fawtier, *Institutions royales*, 469–505.

<sup>69</sup> B. Guenée, 'La géographie administrative de la France à la fin du moyen âge: élections et bailliages', *Le Moyen Âge* (1961), 293–323; J. Rogozinski, 'The Counsellors of the Seneschal of Beaucaire and Nîmes, 1250–1350', *Speculum*, 44 (1969); H. Takayama, 'The Local Administrative System of France under Philip IV (1285–1314)—Baillis and Seneschals', *Journal of Medieval History*, 21 (1995), 167–93; Beaumanoir, *Coutumes de Beauvaisis*, i, cap. 1: 'De L'Office as Baillis'.

*sénéchaussées* answerable to Paris had spread across the whole country, *parlement* settling administrative boundary disputes, as it did in 1255 on the complaint of the men of the *bailliages* of Orleans and Bourges that they were being summoned from one into the other.<sup>70</sup> No doubt because the operation of the court-system depended on them and they appeared in *parlement* to answer for their actions, in 1303 *sénéchaux* and *baillis* were excluded from sitting as *magistri* during their terms of office.<sup>71</sup> Many of the orders they received concerned justice in a narrow sense. *Parlement* might reverse their judgments, but commissioned them to take the executive action on which justice depended. A *bailli* was to see that a prior who had imprisoned a man for appealing from his seignorial court to a *parlement* reversed his judgment and paid damages, 'so that the matter does not come back to us through your neglect'. *Baillis* were to destroy an unlicensed warren made by the count of Blois, and to see that the count of Bar, who had defaulted on an undertaking to pay an abbot two thousand pounds damages a year for five years came before the king at Paris, 'on your bailliage's day in the next *parlement*'.<sup>72</sup> An ordinance required *baillis* to proclaim twice at each assize that anyone having a case in *parlement* should appear on the first or second of the days set aside for their *bailliages* or *sénéchaussées*, or be held in default.<sup>73</sup>

*Parlement* was an instrument for the integration of the state of France politically as well as judicially. The establishment at Bordeaux, after its conquest in 1451, of *Grands Jours* which were soon recognized as a *parlement*, marked the final incorporation into the French kingdom of a region long the possession of the kings of England.<sup>74</sup> In fact from the time of the treaty of 1259 which allowed them to keep Gascony as vassals of France, English kings had been obliged to maintain proctors at Paris to plead their cases at *parlements*, and like the counts of Flanders or the dukes of Burgundy they were sent rolls of *arrêts* affecting their interests, which are preserved in the English chancery records.<sup>75</sup> The ambition of Charles of Anjou to succeed to his brother Alphonse's apanage was ended by a decision of *parlement* in 1284, and in 1294 Philip IV obtained a judgment that Edward I had forfeited Gascony by his failure to appear in *parlement*.<sup>76</sup> French kings became accustomed to consult *parlement* before making treaties. Within the

<sup>70</sup> *Les Olim*, i. 436 (xi)

<sup>71</sup> Langlois, *Textes*, 173 (cxxi).

<sup>72</sup> Ibid. 183 (cxxvi); *Recueil des historiens*, vol. 24, 'preuves', \*363-364\* (no. 251); *Les Olim*, ii. 100 (ix), 117 (xxviii), 138 (xxx), 278 (xv), 312 (vii), 315 (xiii), 355 (x), 496-7 (viii), 594 (vi).

<sup>74</sup> Lot and Fawtier, *Institutions royales*, 480-5.

<sup>75</sup> C.-V. Langlois, 'Rouleaux d'arrêts du roi au XIII<sup>e</sup> siècle', *Bibliothèque de l'École des Chartes*, 48 (1887), 177-208, 535-65, and 50 (1889), 43-67; *Les Olim*, ii. 3-49.

<sup>76</sup> Lot and Fawtier, *Institutions royales*, 335.

realm its function of registering new laws, including financial edicts, along with its scrutiny of the proceedings of the central *Chambre des Comptes* and adjudication on market rights in the country, would give *parlement* considerable authority in economic matters. It insisted that crown property was inalienable; it swore in the king's councillors, marshals, and admirals; it watched over the privileges of the University of Paris.<sup>77</sup> No part of clerical life escaped its attentions: it enforced royal protection of churches, which might claim to plead their cases in *parlement* alone, and became the chief defender of the rights of the Gallican church against both the papacy and kings who made concordats with popes to the French church's detriment. Yet its constant intervention to judge between the claims of churches, landlords, and *baillis* to jurisdiction, its policing of the limits of ecclesiastical justice and vigilance against clerical abuse of excommunication and sanctuary, and its provision of alternative procedures in disputes arising from marriages and wills steadily eroded the Church's position as a state within a state. Prelates could be judged in *parlement* if nowhere else, but in 1319 they were excluded from membership of *parlement* (though not from the king's council) ostensibly so that they could devote themselves to their religious duties.<sup>78</sup>

Whether answering the complaints of subjects, cutting down individual or communal liberties, making sure the great churches contributed to the defences of the towns they dominated, or guarding the peace of the capital and correcting the largely criminal jurisdiction of the *prévôt* of Paris at the Châtelet, the *parlement* of Paris was conscious of acting for the utility of the kingdom. It was, after all, the royal council answering the complaints as well as judging the rights of the king's people, and the king himself had regular times for sitting in it. *Parlement* censored the customs of the country and effectively made law through its regulation of the administrative behaviour of *baillis* and *sénéchaux*. Its orders merged into the general *établissements* which the king made 'pour le commun pourfit' and similarly dispatched to the *baillis* for publication and enforcement.<sup>79</sup> An ordinance requiring those exercising temporal jurisdiction for private lords to be laymen, not clerics, was 'registered among the judgments, counsels, and decrees' of *parlement*.<sup>80</sup> An order which Philip IV sent to the provost of Paris and

<sup>77</sup> Ibid. 435–40.

<sup>78</sup> *Les Olim*, ii. 490 (v); Lot and Fawtier, *Institutions royales*, 448–68.

<sup>79</sup> *Ordonnances des Roys de France*, i. 314, 318–19, 323; Beaumanoir, *Coutumes de Beauvaisis*, i. 39–40 (§51); Langlois, *Textes*, 186–7 (cxxxvi, §10, cxxxvi bis); Strayer, *Reign of Philip the Fair*, 24, 70, 75, 86–8, 208, 230–6, 245–6; R. W. Kaeuper, *War, Justice, and Public Order: England and France in the Later Middle Ages* (Oxford: Clarendon Press, 1988), pp. 240, 258–9.

<sup>80</sup> *Ordonnances des Roys de France*, i. 316–17.

all his other seneschals and baillies in 1309 on how they should requisition supplies (*prises*) for the royal household (a perennial subject of grievance to the people) was 'given at Paris, in our *parlement*'; as was the order of 1313 regulating 'the estate and officers' of the Châtelet and forbidding that court to hear any case concerning inheritance, personal estate or condition, or involving sums of more than sixty shillings.<sup>81</sup> The seeds of *parlement*'s claim to register all royal edicts appear in *Olim* in a note appended to a royal letter of 1310 ordering the king's agents in Périgord to stop exactions complained about by the inhabitants: the clerk wrote that the precise terms of the ordinance had not yet been seen, and it was good that they should be recorded.<sup>82</sup>

#### ENGLISH PARLIAMENTS

The antiquary William Camden ended his *Britannia*, a book which went through four editions within eight years of its publication in 1586, with an account of the 'Law Courts of England', ecclesiastical, temporal, and 'one mixed of both', that is Parliament. He knew that in the thirteenth century the name of this high court was 'of no great antiquity, and the same borrowed out of France', but he insisted that it was only the name, since he was intent on carrying the origins of the politically active parliament of his own time back to the Anglo-Saxons.<sup>83</sup> Yet the parallels between the development of what the legal writer 'Fleta' describes in the 1290s as the English king's new 'court in his council in his parliaments' and the growth of the French king's *parlement* are unmistakeable.<sup>84</sup> 'Parliament' first appears in official records in the 1230s to mean a meeting of the king and his councillors acting as a court of last resort. In November 1236 a law-suit about the ownership of an advowson (the right to present a clerk to a living) was adjourned from the court *coram rege* (the court 'with the king', or 'king's bench') at Woodstock 'to the octaves of Saint Hilary at Westminster at the parliament (*ad parliamentum*)'.<sup>85</sup> Cases of political importance would naturally come before judges reinforced by lords who happened to be present in the king's court. Disputes between the king and the magnates became particularly intense after Henry III launched a campaign against the baronial

<sup>81</sup> *Les Olim*, ii. 497–500 (x), 587–9 (xx).

<sup>82</sup> *Ibid.* ii. 506 (v).

<sup>83</sup> Harding, *England in the Thirteenth Century*, 23.

<sup>84</sup> *Fleta*, ed. H. G. Richardson and G. O. Sayles, Selden Soc. 72, 89, 99 (London, 1953–83), ii. 109–10.

<sup>85</sup> *Curia Regis Rolls of the Reign of Henry III*, xv. 1233–7 (London: HMSO, 1972), no. 2047; H. G. Richardson and G. O. Sayles, 'The Earliest Known Official Use of the Term "Parliament"', *EHR* 82 (1967), 747–50; Harding, *England in the Thirteenth Century*, 280.

usurpation of liberties, and petitions to the king for the restoration of franchises which the sheriffs were overriding could not be answered without consulting the exchequer at Westminster and its records. By 1238 the king was regularly adjourning matters 'complained of' or 'shown' to him and his court on progress at Windsor, Clarendon, or Woodstock to a few working days after the beginning of an exchequer session: that is, to the *octave* or *quindene* of St. Hilary (near to Candlemas), Easter, Trinity, or (most frequently) Michaelmas. The name of 'parliaments' seems to have been first applied in a technical sense to these judicial sessions at Westminster, which in the 1250s were thus being held at regular times in England as well as in France. Whether final judgment in a case was given by the barons of the exchequer, or by royal justices sent into the country to hear the *querelae*, or as a result of an inquest by the king's escheators, the process was controlled by king and council (which included the judges), and the final decision in a case could be described as made 'in our court before us [the king] and our whole parliament'.<sup>86</sup>

The evidence suggests that political debate and the mustering of troops at parliaments, the activities bound to strike the chroniclers, were additions to the original judicial functions which were what made parliament an institution distinguishable from essentially political 'great councils'. In any event, justice easily merged into politics in 'whole', 'great', or 'general' parliaments. Did the chancery clerk who wrote the order to the sheriffs in 1244 not to admit baronial franchises unless they had been enjoyed at the time of the 'parliament of Runnymede' understand the famous assembly of 1215 as political or judicial in its framing of the Great Charter of English liberties?<sup>87</sup> Matthew Paris introduced the term to his *Great Chronicle* in 1246 in an obviously political sense: he says that Henry III 'called the whole nobility to London for a general parliament of the English realm (*ad parlamentum generalissimum regni Anglicani*), that is the prelates, abbots, and priors, as well as bishops, earls, and barons, to deliberate effectively concerning the precarious state of the kingdom, as urgent necessity demanded'. The proceedings of a parliament in February 1251 shows how political significance attached to originally judicial proceedings. An accusation made to the king and his council against a leading royal justice, Henry of Bath, of taking bribes and giving false judgments while on eyre, was adjourned

<sup>86</sup> *Close Rolls*, 1237-42, 447; *Close Rolls*, 1247-1251, 104, 107; *Close Rolls*, 1251-3, 468; *Close Rolls*, 1254-6, 43, 60, 83, 118, 128-9, 132, 136, 196, 212, 223; J. E. A. Jolliffe, 'Some Factors in the Beginnings of Parliament', *TRHS*, 4th ser. 22 (1940), 108-39, and R. F. Treharne, 'The Nature of Parliament in the Reign of Henry III', *EHR* 74 (1959), 590-610: both articles reprinted in *Historical Studies of the English Parliament*, 2 vols., ed. E. B. Fryde and E. Miller (Cambridge UP, 1970).

<sup>87</sup> *Close Rolls*, 1242-7, 242; cf. *Close Rolls*, 1247-51, 539; *Close Rolls*, 1253-4, 43.

*coram rege* according to the record, or before the king 'in parliament at Windsor' according to the chronicler Thomas Wykes; while the Annals of Tewkesbury and Matthew Paris transfer the process to a 'great parliament' at London, where King Henry is described as magnifying the accusations into treason, allegedly swearing in typical style that 'if someone killed Henry of Bath he should be acquitted of his death' and having to be restrained by his councillors. The most interesting detail in Matthew's account is that a proclamation was made 'in London and in the court' (presumably at Westminster) summoning anyone having *querelae* against the judge to present them, and that many complainants (*queruli*) did so. In the proceedings against Henry of Bath may be seen the distant origins of the procedure of impeachment, by which the king's ministers would be put on trial in parliament 'by the clamour of the commons'.<sup>88</sup>

The parliament which set about reforming the state of the realm at the instance of the barons in 1258, put at the centre of its scheme of government 'three parliaments every [administrative] year, the first at the octave of Michaelmas, the second on the morrow of Candlemas, and the third on the first of June'. That 'mad parliament of Oxford' was nothing if not political, yet the detailed legislation that stemmed from it suggests that the effective answering of petitions and the proper exercise of judicial power on the part of the lords as well as the king were its chief objectives. In 1215 a permanent court in a fixed place for the hearing of common pleas had been a demand of the barons; in 1258 it was the consolidation at Westminster of a high court standing above the courts of king's bench, common pleas, and the exchequer, and meeting at fixed times. From the answering of specific petitions would follow general legislation. The three annual parliaments prescribed at Oxford were for the elected councillors of the king to 'review the state of the realm and of the king together', and 'the justices and other wise men' were ordered 'between that and the next parliament [to] consider of what ill laws and need of reformation there were'. In July 1258 there was a further edict that there should be sent to Westminster for the Michaelmas parliament the records of the inquests which the Oxford parliament had ordered to be made in every county into complaints of 'all serious offences, trespasses and wrongs committed . . . in times past by any persons whatsoever to any others, [that is by] justices and sheriffs as well as our other bailiffs and all other persons whatsoever'.<sup>89</sup>

These reports, along with complaints adjourned to parliaments from the

<sup>88</sup> Matthew Paris, *Chronica Maiora*, iv. 511, 518, 526, 622, v. 20, 213–23, 324, 373, 493; *Annales Monastici*, i. 143, iv. 101; Treharne, 'The Nature of Parliament', 76–7; Harding, 'Plaints and Bills in the History of English Law', 78–80.

<sup>89</sup> *Documents of the Baronial Movement*, 110–11, 114–15; G. O. Sayles, *The Functions of the Medieval Parliament of England* (London, 1988), 62–79.

justiciar's eyre, were no doubt among the sources of the provisions finally promulgated at the Michaelmas parliament of 1259. The Latin 'Provisions of Westminster' put first the limiting of the powers of landlords to distrain tenants to attend their courts and of the obligation of the king's subjects to attend sheriffs' tourns. They were followed by administrative provisions couched in French, ordering the appointment of justices to go throughout the land accompanied by representatives of the community (*del commun*), 'to see that justice is done to plaintiffs and to all others' and 'that the *establissemenz* which are made for the good of the realm, both those already made and those still to be made, are enjoined upon the counties for observance'. The four knights' reporting of complaints against the sheriff to the justiciar was to continue, and to carry forward the business at the centre two or three councillors were to be 'in constant attendance on the king from one parliament to the next'.<sup>90</sup>

The judicial functions and political uses of parliaments ran in parallel, sometimes reinforcing each other, sometimes conflicting. The king found it difficult to accept meetings which should happen automatically, without his summoning. He tried to prevent the holding of the Candlemas parliament of 1260 while he was absent in France, and at the midsummer parliament he put to an inquest of bishops a series of charges against Simon de Montfort, including that the earl of Leicester had insisted on the convening of parliament as the Provisions of Oxford stipulated.<sup>91</sup> To the next Candlemas parliament there were adjourned questions of the validity of a baron's debt to a Jew, and the Earl Marshal's claim to the custody of prisoners arraigned in the justiciar's eyre as well as king's bench and the profits therefrom;<sup>92</sup> the only other 'parliament' which may have met in 1261 was that which Henry summoned to Windsor in September to forestall an assembly of knights, three from each county, called to St. Albans by the baronial party. Parliament did meet at normal times in 1262: the Michaelmas session again took place in the king's absence, and Simon de Montfort made a dramatic intervention in it to exhibit a letter from the pope upholding the Provisions of Oxford; Philip Basset the justiciar also called to it a dispute concerning a franchise likely to disturb the peace 'in the uncertainty within the realm'. Only an autumn parliament is recorded in 1263 as the country moved towards civil war, and in 1264 only the parliament which the triumphant barons called after the battle of Lewes in the name of the captive king. The famous assembly at Hilary 1265 to

<sup>90</sup> Sayles, *ibid.* 81; P. Brand, 'The Drafting of Legislation in Mid-Thirteenth Century England', *Parliamentary History*, 9 (1990); *Documents of the Baronial Movement*, 137–64.

<sup>91</sup> Sayles, *Functions of the Medieval Parliament*, 21–2, 86–94; *Documents of the Baronial Movement*, 172–3.

<sup>92</sup> *Ibid.* 95–6.

which Earl Simon summoned two knights from each shire and two burgesses from each borough, and which was consequently long regarded as the first true parliament, faced the intractable political problem of how to release Prince Edward from captivity and make a true peace. But even as Simon de Montfort's position began to crumble the trials of disputes involving leading barons were being adjourned to 'our next parliament at London on the first day of June'.<sup>93</sup>

The parliaments held by Henry III in the two years after de Montfort's defeat and death at Evesham on 4 August 1265 were engaged in pacifying the country, a task of which the settlement of landed disputes arising from 'the time of war' was a major part. The Londoners had to go to a parliament at Northampton in April 1266 to seek restoration of the 'state' which they had lost after the battle of Evesham because of their adherence to de Montfort. In his parliament outside the still resisting Montfortian stronghold of Kenilworth in August 1266, the king appointed a commission of reliable prelates and barons to make recommendations on 'the estate (*status*) of the disinherited by occasion of the late war in England, saving the estate of the king and his dignity'. By their award (the 'Dictum of Kenilworth'), made 'to the honour of the church' and for 'the good, prosperous and peaceable state of King Henry', de Montfort's supporters were to redeem their lands by payments proportional to their offences. Then, in a parliament at Marlborough in November 1267, Henry 'provided for the betterment of his realm of England' as his royal office demanded, in fact by a statute which largely re-enacted the baronial Provisions of Westminster of eight years before. In 1270, an Easter gathering in London (exorbitantly described by a local source as of 'almost all the bishops, earls, barons, knights and freeholders of the whole realm of England') was continued as a parliament at Westminster, because it was necessary to provide for the kingdom's state and rule (*de statu et regimine*) before Henry and Edward departed on crusade. (In the event Henry did not go with his son, because of his ill health and the dangers in their both leaving the realm together.)<sup>94</sup>

The development of English parliaments and French *parlements* diverged from a common judicial root established in the third quarter of the thirteenth century. In 1268 parliament fell back into a regular pattern of sessions at Westminster or (less frequently) London, usually at Easter and Michaelmas, though special parliaments were held as required at other places. After his accession in 1272 while on crusade

<sup>93</sup> Sayles, *Functions of the Medieval Parliament*, 97–109; *Handbook of British Chronology*, 3rd edn., ed. E. B. Fryde, D. E. Greenway, S. Porter, and I. Roy (London: Royal Historical Society, 1986), 541–2; *Close Rolls*, 1264–8, 96, 118.

<sup>94</sup> Sayles, *Functions of the Medieval Parliament*, 110–15, 126; *Handbook of British Chronology*, 543–4; *Close Rolls*, 1264–8, 558–9.



and his return in 1274, Edward I stated his intention to continue to hold parliaments at Easter and Michaelmas.<sup>95</sup> It is worth noting that the *parlement* of Paris abandoned meetings at Candlemas after 1278, and thenceforth held sessions regularly at Whitsun and All Saints, though the norm of two parliaments a year does not seem to have been stated in France until 1303.<sup>96</sup> The king of England might try to avoid the perils of judgment in the *parlement* of his French overlord, on one occasion urging his seneschal in Gascony to come to terms with a complainant 'whatever the cost',<sup>97</sup> but to their own parliaments Edward I and his successors would order cases to be adjourned months in advance, and no writs of summons were necessary to ensure the attendance at them of councillors, justices, and serjeants-at-law. The king might call individual pleas of *quo warranto* (in which lords were required in 1278 to prove their right to franchises before the justices in eyre) from the eyre to parliament, and 'the record and process' of cases in king's bench, particularly in cases 'especially touching ourselves and the state of our crown and kingdom', such as Edward II's suit against Master John of Stratford for his disobedience in his negotiating for the king at the papal curia.<sup>98</sup> London Jews accused of crucifying a Christian boy and throwing his body into the river were summoned before parliament so that the king could decide (after consultation with the justices in eyre at the Tower and the justices of the Jews) how to punish 'so loathsome a deed'.<sup>99</sup> Cases might still be referred by king and council to the barons of the exchequer for investigation, or to the court of king's bench to carry forward procedure, but it was increasingly often insisted that the completion of justice (*complementum justicie*) should be in parliament. Cases were continued from one parliament to the next. Recognizances of debt might be entered into and the results of inquisitions be recited in parliament, and a man could be ordered to confirm a marriage covenant there. Mediation in a jurisdictional dispute between a bishop and some Cistercian abbots took place in parliament; a case between the city of Chester and the county of Cheshire about the citizens' obligation to contribute to the upkeep of Chester bridge was brought there. Parliament was where right was given to all, and major trespasses against the king's peace dealt with.<sup>100</sup>

<sup>95</sup> Sayles, *Functions of the Medieval Parliament*, 23, 115 ff., 135, 141–3.

<sup>96</sup> Langlois, *Textes*, 84, 95, 174, 178, 229 ff.

<sup>97</sup> Sayles, *Functions of the Medieval Parliament*, 328–9.

<sup>98</sup> Ibid. 138, 173, 189, 198, 202, 208, 210, 382–3, 454; *Select Cases in the Court of King's Bench*, ed. G. O. Sayles, 7 vols. (London: Selden Soc., 1936–71), i, pp. li, cxlii–cxliii, 49, 79, 92, 116, 144, 158; ii, pp. lxii, lxvii n., lxx–lxxii, clii, 23, 139; iii, pp. cxviii, cxxii, cxxiv, cxxix, 17, 135, 143, 145, 160, 171, 175; iv (Cases under Edward II), pp. xlvi, 122, 123 (a matter specially touching the king, *et statum corone nostre et regni nostri*), 132, 143; v (Cases under Edward III), p. cxxxiv.

<sup>99</sup> Sayles, *Functions of the Medieval Parliament*, 146.

<sup>100</sup> Ibid. 149, 150, 151, 154, 157–63, 164, 167, 185, 302; *Calendar of Close Rolls*,

The 'Mirror of Justices', an anonymous work compiled towards 1290, called it 'an abuse that, whereas parliaments ought to be held for the salvation of the souls of trespassers twice a year and at London, they are now held but rarely and at the king's will for the purpose of obtaining aids and collection of treasure'. The pattern of judicial parliaments at Westminster was certainly disrupted by Edward's Welsh and Scottish wars and preoccupations in France, but adjournments continued to be made 'to the next parliament' in expectation of Edward's return, and eventually the regent had to be allowed to hold a parliament at Easter 1289.<sup>101</sup>

Of course, other sorts of business were transacted at judicial parliaments if they arose at the right time: Henry III's younger son Edmund was married at the Easter parliament of 1269, and it was only after King Edward the Confessor's bones had been translated to a new shrine in Westminster abbey at Michaelmas that year that 'the nobles began, as was their wont, to discuss the business of the king and of the kingdom by way of parliament' and agreed to a tax of a twentieth on moveable property. Edward I summoned representatives of the shires and boroughs to his first great parliament at Easter 1275, following de Montfort's example ten years earlier, but this time to facilitate the agreement to new customs duties; and he added knights of the shire to an Easter parliament in 1290 for the granting of a fifteenth on moveables. Representation of the shires, boroughs, and sometimes clergy as well, which was irrelevant to judicial parliaments, became more frequent in the emergencies of the latter part of Edward I's reign and on into Edward II's reign, at assemblies which might be called at any time, perhaps away in the north of the country.<sup>102</sup>

Representative parliaments were on the way to becoming real political assemblies, occasions when 'the soundest wisdom' could 'be brought to bear on the affairs of the king and the realm'. The defeat and death of Earl Simon at Evesham in August 1265 had halted baronial attempts to control the government, but during the weak rule of Edward II (1307–27) the uses of parliament for this purpose once more became apparent. In 1310, the contemporary *Life of Edward the Second* relates, the barons secured the election of 'twelve discreet and powerful men . . . by whose judgement and decree the state should be

1272–79, 167, 170, 200, 267–8, 271–2, 274; Jolliffe, 'Some Factors in the Beginnings of Parliament', 103 ff., 108 ff., 113; *Select Cases in the Court of King's Bench*, i, pp. lxx, 14, 45, 167, 179; ii, pp. cxxviii, 24, 151; iii, pp. lxxxvii, cxxii, cxxiv; iv, pp. 64, 87, 90; vi (Cases under Edward III), 7, 27–8; vii (Cases under Richard II, Henry IV, and Henry V), 220.

<sup>101</sup> Sayles, *Functions of the Medieval Parliament*, 28 (n. 54a), 179–82, 189–93.

<sup>102</sup> Ibid. 119, 125, 201, 351; *Handbook of British Chronology*, 544–7.

reformed and consolidated (*status reformaretur et consolidaretur*).<sup>103</sup> The modern translator of the *Vita Edwardi Secundi* has 'conditions' being reformed, though *status* is clearly in the singular, and there may be a suggestion here of the notion of an abstract 'state' which historians are reluctant to admit at this early date.<sup>104</sup> The Parliament Roll says that the job of the Ordainers was 'to ordain and establish the state of the [king's] household and his realm (*ordiner & establir l'estat de son houstiel et de son roiaume*)';<sup>105</sup> and Earl Thomas of Lancaster, Edward's chief critic, confirmed the identification of the king's state with his household as the seat of government when he resolved to ordain 'what seems necessary . . . for your household and the rule of your kingdom'.<sup>106</sup> In this period the king of France linked his 'rights, state and honour' with those of his realm only to resist an ideological offensive by the papacy;<sup>107</sup> in England the connection between the state of the realm and the quality of its rule was made at times of internal political discontent.

In 1322 Thomas of Lancaster was defeated and executed, and Edward II obtained the repeal of the Ordinances imposed on him in 1311, several of which had given parliaments a leading role in government, but parliaments constituted of magnates. Chapter 9 of the Ordinances had laid down that the king was not to make war against another kingdom or appoint a keeper of the realm in his absence without the 'common assent of his baronage and this in parliament'; chapter 14 that the appointments of chancellor, chief justices, treasurer, and other ministers required similar approval. In response, the Statute of York of 1322 declared that 'the estate of the king and the estate of the realm' must be discussed by the assent of prelates, barons, *and commonalty*.<sup>108</sup>

<sup>103</sup> For the Ordinances of 1311, see *Rotuli Parliamentorum [RP]*, Edward I–Henry VII, 6 vols. (London, 1783; index vol., 1832), i. 281–6: tr. in *EHD* iii. 1189–1327, ed. Harry Rothwell (London, 1975), 527, 530 (cc. 13, 14).

<sup>104</sup> *Vita Edwardi Secundi*, ed. and tr. N. Denholm Young (Edinburgh, 1957), 9.

<sup>105</sup> *RP* i. 281a, 282b (cc. 13, 14).

<sup>106</sup> *RP* i. 351–2; J. R. Maddicott, *Thomas of Lancaster, 1307–1322: A Study in the Reign of Edward II* (Oxford UP, 1970), 181–2, 188, 192, 196–7, 1319; W. Childs, 'Resistance and Treason in the *Vita Edwardi Secundi*', in *Thirteenth Century England VI*, ed. M. Prestwich, R. H. Britnell, and R. Frame (Woodbridge, 1997).

<sup>107</sup> *Documents relatifs aux États Généraux et Assemblées réunis sous Philippe Le Bel*, ed. M. G. Picot (Paris, 1901), 1, 3, 8, 14, 15, 26; J. H. Denton, 'Philip the Fair and the Ecclesiastical Assemblies of 1294–5', *TAm Phil Soc* 81/1 (1991), 35, 38.

<sup>108</sup> *Statutes of the Realm [SR]*, ed. A. Luders, *et al* 11 vols. (London: Record Commission, 1810–28), i. 189–90: tr. *EHD* iii. 543–4; G. L. Haskins, 'A Draft of the Statute of York', *EHR* 52 (1937), 74; Gaines Post, 'Status Regis and Lestat du Roi in the Statute of York', in his *Studies in Medieval Legal Thought: Public Law and the State, 1100–1322* (Princeton UP, 1964).

## PETITIONING PARLIAMENT FOR JUSTICE

Others of the Ordinances of 1311 mentioning parliaments had a judicial rather than political flavour. If the barons of the exchequer unjustly disallowed tallies of receipt of debts paid to the crown, plaintiffs should 'have their recovery against them by petitions in parliament', as should those wrongfully impleaded in the exchequer (cc. 24, 25). The king was 'to hold parliament once a year, or twice if need be, and this in a convenient place', to hear pleas which royal servants refused to answer without consultation with the king, and also pleas where the justices held different opinions; 'and likewise the petitions which shall be handed in at parliament are to be determined as before, as law and justice require' (c. 29). Magna Carta and the Charter of the Forests were 'to be kept in all their articles' and anything found ambiguous in them 'clarified in the next parliament after this by the advice of the baronage and the justices and other learned men of law' (c. 38). And a bishop, two earls, and two barons were 'to be appointed in each parliament to hear and determine all the complaints of those who wish to complain against the king's ministers, whoever they may be', who contravened the Ordinances (c. 40).<sup>109</sup>

A political role was added to the judicial purposes of parliament so much more conclusively in England than in France because of the previous development of the king's courts and the greater flexibility this allowed in dealing with the stream of complaints. The Provisions of Westminster of 1259 had given to the justices in eyre the power to hear complaints of trespasses brought without writs against officials or anyone else (*ad audiendum omnes querelas de transgressionibus quibuscunque factis*).<sup>110</sup> The process after 1265 of settling disputes arising from 'the troubled time', and the renewal by Edward I, immediately on his return from crusade, of administrative inquiries before itinerant justices stimulated a further increase of oral complaints—and the crucial transition to written bills. The schedules of articles in the eyre rolls of the late 1260s detailing trespasses against individual complainants 'in the time of trouble' seem likely to have been framed by the victims themselves.<sup>111</sup> Before the inquest Edward set on foot throughout the counties of England in 1274 concerning 'certain rights, liberties, and other matters affecting us and our state and the state of the community of the said counties' and 'the deeds and behaviour of all sheriffs and bailiffs', the

<sup>109</sup> Sayles, *Functions of the Medieval Parliament*, 42, 303–6, 329, 380, 433; *Select Cases in the Court of King's Bench*, iv. 72.

<sup>110</sup> Jacob, *Studies in the Period of Baronial Reform and Rebellion*, 70–125, 147.

<sup>111</sup> *The Roll of the Shropshire Eyre of 1256*, pp. xliii, lxxiii; *Select Cases of Procedure without Writ*, pp. lxii–lxiv; Harding, 'Plaints and Bills in the History of English Law', 68, 76.

proceedings of which are recorded in the 'Hundred Rolls', five Essex townships independently presented the offence of a hundred bailiff, Richard Brown, against Petronilla of Asheldham; in a separate entry Petronilla complained (*queritur*), surely in writing, of how Brown broke into her house by night demanding money, bound her and her husband so tightly as to draw blood, and carried off a long list of goods worth in total four pounds.<sup>112</sup> Returning in 1289 from a long absence in France, Edward I would appoint special *auditores querelarum* of injuries and wrongs unjustly inflicted upon the people while he was away, those committed 'by his justices' as well as by his 'sheriffs or any of his ministers or bailiffs'.<sup>113</sup> In the same year of 1298 in which his enemy Philip IV was listening to the complaints of the people of the Toulousain, Edward would commission a lawyer and a local knight on each of a number of circuits throughout England 'to hear and determine all manner of grievances done to his people in his name' on account of the war.<sup>114</sup>

Occasionally from 1261, and generally from 1278, when the justices in eyre were given permanent powers to hear trespasses on complaint, special membranes of complaints, headed *querelae de transgressionibus* or *rotuli de querelis* were included in eyre rolls, usually among the crown pleas (i.e. criminal cases).<sup>115</sup> The first surviving written bills to the justices in eyre, which date from 1286, are found to correspond to complaints in the *rotuli de querelis* of the eyre rolls, and they are in French, the vernacular of the litigants and their legal advisers in the country, not the professional Latin of chancery clerks or Westminster lawyers. Sometimes they are rambling and ungrammatical, but mostly they are terse and business-like descriptions of trespasses, e.g.: 'John Burdun of Edingale [Staffs.] complains [*sey pleynt*] to the Justices of our lord the King . . . that Robert Fox of Tean on the Thursday next before the Ascension in the twentieth year of our lord King Edward came in the high road in Edingale wrongfully and with force and arms against the peace and did beat him and grievously wound him to his damage of forty shillings, so that he hardly escaped death; and he prays you [the justices] that for God's sake and your own souls' sake that this may be inquired of by a good jury.'<sup>116</sup> To such complaints may be compared the first known bills to parliament: the sixty-five presented to king and council in 1278, which are preserved in a seventeenth-century copy.

<sup>112</sup> *Rotuli Hundredorum*, 2 vols. (London: Record Commission, 1812-18), i. 136-7; H. M. Cam, *The Hundred and the Hundred Rolls* (London, 1930), 39-40, 42-3, 258.

<sup>113</sup> Sayles, *Functions of the Medieval Parliament*, 195-7.

<sup>114</sup> *A Lincolnshire Assize Roll for 1298*, ed. W. S. Thomson. Lincolnshire Record Society, 36 (1944).

<sup>115</sup> Harding, 'Plaints and Bills in the History of English Law', 75.

<sup>116</sup> *Select Bills in Eyre* (1292-1333), ed. W. C. Bolland, Selden Soc. 30 (London, 1914), 71.

They are also mostly in French and differ from bills in eyre only in being more generally the complaints of tenants-in-chief, or in relating to the baronial liberties which King Edward ordered at a parliament at Gloucester in that same year of 1278 to be investigated by the justices in eyre. The *pleynte* of the Countess of Warwick to king and council was that the justices of Common Pleas had wrongly allowed an adjournment to her opponent in a lawsuit for lands in Essex; the *querela* of the men of St. Augustine's, Canterbury, that the sheriff of Kent infringed their rights as inhabitants of a hundred which was ancient demesne land of the king; and the prayer of Guner widow of John Wyger that she be granted her dower by Edward as guardian of her deceased husband's heir, since the king could not be sued by his own writ.<sup>117</sup>

For the mass of bills which came to it at parliament time the king's council would simply act as a clearing house, if it could not divert the stream before it reached Westminster at all. Alongside the first of Philip III's *établissements* for the *parlement* of Paris issued in January 1278, which ordered that 'for the shortening of parliaments care should be taken not to retain cases in them which could or ought to be taken before the *baillis*',<sup>118</sup> may be set both chapter 8 of the statute of Edward's parliament at midsummer 1278 which provided that complaints of trespass seeking damages of less than 40s. should be heard by the sheriffs, and the edict of 1280 which lamented the harassment of the king's parliaments by a multitude of petitions which could be submitted, and for the future must be submitted, directly to the chancellor, justices, or exchequer. Petitions which needed royal decision should come before the king only by the hands of the chancellor and other principal ministers, so that the king and council could 'attend to the great business of his kingdom and of his foreign lands without being burdened by other matters'.<sup>119</sup> Nevertheless, arrangements had continually to be refined for the reception, 'auditing', and 'trial' of petitions brought to parliament. The answering of petitions remained the core of parliament's business, and files and rolls of petitions the basis of its records. If the king called a parliament for a different purpose, such as in 1332 arranging for the keeping of the peace while he went on crusade, he might send the commons away at the end of the first week with an assurance that he meant to have another parliament soon to answer 'the petitions of the people'.<sup>120</sup>

<sup>117</sup> Sayles, *Functions of the Medieval Parliament*, 21; RP i. 2, 4, 6, 7 (nos. 7, 14, 23, 31).

<sup>118</sup> Langlois, *Textes*, 95 (1).

<sup>119</sup> SR i. 45–50; R. C. Palmer, *The County Courts of Medieval England 1150–1350* (Princeton UP, 1982), 235 ff.; *Calendar of Close Rolls, 1279–88*, 56–7; Sayles, *Functions of the Medieval Parliament*, 172.

<sup>120</sup> Sayles, *Functions of the Medieval Parliament*, 24, 39–40, 47, 51, 195–6, 206, 209,

What could be called 'the bill revolution' marked a second beginning for the English legal system. At the top, the new high court of parliament was created. The earliest Rolls of Parliament, which survive from 1290, are headed 'Pleas [*placita*] before the Lord King and his Council at his Parliaments' for the longer entries, and 'Petitions in Parliament' for the shorter entries that follow.<sup>121</sup> No plea can be representative of a court designed for exceptional cases, but that of the bishop of Winchester against Henry Hose in 1290 shows some of the factors bringing a case to a parliament. At the Hilary meeting at Westminster the bishop sought remedy for the trespasses of the royal constable of Portchester in his hunting parks during his absence on the king's business—trespasses which he had denounced before the special auditors of complaints against the king's ministers appointed on Edward's return from France. In June all the parties appeared before the king and his council, the auditors bearing record of the proceedings before them, the bishop exhibiting a charter granting the hunting rights, and the constable claiming that he had done only what his predecessors did by right of their office. Both bishop and constable asked for a sworn inquest, but since it seemed to the court that it was the king they should be suing as grantor of the charter and owner of the castle, it was decided that they should await the king's will.<sup>122</sup> In another case in 1302, a coheir who was dissatisfied with the apportionment of a deceased tenant-in-chief's lands made in the chancery at Westminster in the presence of the justices and other members of the council delivered a bill into the king's hands at the midsummer parliament, and the king had the receiver of petitions read it out on the spot, then reaffirming that the custom of the realm must be followed.<sup>123</sup>

As in any other court a petitioner could be represented in parliament by an attorney, and a *querela* could be brought there on the king's behalf and receive the reply that the king should have a writ in a lower court. The Rolls of Parliament functioned like other plea rolls in keeping track of adjournments from one session to another. Usually king and council gave preliminary judgments on petitions to be completed elsewhere, and final judgments only when other courts could not: parliament was thus a 'co-ordinating centre' of judicial sessions. The replies endorsed on petitions in parliament were regularly that the petitioners should simply 'sue at the common law' or go to the barons

251 n., 290-1, 338-47, 353 n., 361 n., 408, 412, 414, 426; *Rotuli Parliamentorum Anglie hactenus inediti*, ed. H. G. Richardson and G. O. Sayles (Camden Soc. 3rd ser. 51, 1935), 70-80: tr. in *EHD* iii. 621-9.

<sup>121</sup> *RP* i. 15 ff., 46 ff., 66 ff., 154 ff.; Sayles, *Functions of the Medieval Parliament*, 195-6.

<sup>122</sup> *RP* i. 25-6 (no. 16).

<sup>123</sup> Sayles, *Functions of the Medieval Parliament*, 253-5.

of the exchequer or to the chancellor for a remedy.<sup>124</sup> The judges in the lower court might be reluctant to give a decision, however, when 'they were not adequately advised about the right and estate of the lord king' in the matter, and a bishop of Norwich once asked for the errors he alleged in a judgment given in the court of common pleas and reaffirmed in king's bench to be examined by the triers of petitions in parliament, since he could get redress nowhere else.<sup>125</sup> To the barons of the exchequer went petitions about wardships, liberties, the collection of taxes and payments due to or from the king. But in 1329 they stubbornly refused to hear a plea sent them from parliament, since it was against the common law for it to adjudicate about freehold property, and eventually the council had to order the transference of the record of the case to chancery.<sup>126</sup>

Bills of complaint began to be directed by petitioners straight to king's bench, and in the fourteenth century the new courts of chivalry and admiralty were created to deal with petitions arising from the war with France. The most potent new jurisdiction to develop at the centre was, however, the court of chancery. In the course of time bills concerning the breaches of trust and contract which the common law courts had not learned to handle would be submitted directly to the chancellor, who was expected, as invariably a churchman, to be concerned with matters of good faith and conscience. But from the beginning his expertise as an originator of writs and commissions and a keeper of records made him the central figure in the management of 'parliamentary' petitions.<sup>127</sup> For example, in 1293 a petition concerning a tenement allegedly given by a mother to her son in return for sustenance during her lifetime and now in dispute was sent to chancery for the parties to 'come to an agreement if they can, and if they cannot they should return to the next parliament'.<sup>128</sup> Parties and witnesses could be summoned to chancery, or evidence taken in the localities be returned there.

The administration of justice in the country was transformed by one common response to petitions in parliament, advice to the petitioners

<sup>124</sup> *RP* i. 38 (no. 35); *Select Cases in the Court of King's Bench*, ii, p. lxix, iii, pp. xxxii, lvi, 176, 180–90, 191 ff.; Jolliffe, 'Some Factors in the Beginnings of Parliament', 103 ff., 108 ff., 113; H. G. Richardson and G. O. Sayles, 'Parliaments and Great Councils in Medieval England', repr. from *The Law Quarterly Review*, 77 (1961), in the same authors' *The English Parliament in the Middle Ages* (London 1981), article 26, p. 4.

<sup>125</sup> *Select Cases in the Court of King's Bench*, ii, p. lxxi; v, pp. clii–cliii; vii, p. 52.

<sup>126</sup> *Ibid.* v, p. lxxxv; cf. Sayles, *Functions of the Medieval Parliament*, 210, 219, 221–4, 235, 253.

<sup>127</sup> Sayles, *Functions of the Medieval Parliament*, 350, 374, 400; *Select Cases in the Court of Kings Bench*, ii, pp. cxli–cxlii, 166–8; v, pp. xv, lxvii ff., lxxi–lxxiii, 35; Harding, *The Law Courts of Medieval England*, 98 ff.

<sup>128</sup> Sayles, *Functions of the Medieval Parliament*, 212–13.



that they should go to chancery and purchase commissions for special justices to 'hear and determine' their complaints: *Adeat Cancellarie, et habeat ibi Justiciarios ad audiendum et terminandum per Finem*, or 'Eit Brief de trespas a la commune Ley, ou de oier et terminer par fyn faire s'il voet'.<sup>129</sup> A new form of commission was needed to deal with oral complaints and written bills of trespass: a writ had only to be seen and recognized to know how the case should be tried, but a plaint had to be listened to before it was clear what the action was. A whole range of commissions of oyer and terminer were sought: to deal with trespasses committed against particular complainants, or the trespasses committed by particular royal ministers, or trespasses of a particular type in particular counties. For instance, in 1254 three justices were ordered to hear the complaints of all who wished to complain of trespasses committed by a past sheriff of Yorkshire; and in 1258 another royal justice was commissioned to hear the complaints of one Walter,<sup>130</sup> a tenant on the king's manor of Bromsgrove, of trespasses done to him in lands and chattels, the commission being granted out of compassion for the simplicity and poverty of the said Walter. A justice and four northern knights who were experienced royal administrators received instructions in 1275 to hear and determine all the disputes arising between the mayor and citizens of York and the abbot of St. Mary's, York, doing so 'in accordance with what was shown to us in our parliament at Westminster after the Close of Easter last' and 'with the arguments and allegations propounded and advanced before' two auditors appointed in parliament and recorded in a roll that would be sent to the commissioners.<sup>131</sup>

By the early years of the fourteenth century lords were going to the chancery in numbers to get commissions of oyer and terminer to use as weapons against their enemies, expecting to say who the justices should be. As the community of the realm protested to Edward II, a *grant Seigneur, ou homme de poer* who wished to ruin someone had only to allege a trespass and purchase commissions of oyer and terminer to people favourable to himself, and he would get damages of £200, £400, or even 1000 marks, when 20s. would have been enough for the supposed injury.<sup>132</sup> The manipulation of plaints and judicial commissions by the powerful was a major factor in a growing disorder in late medieval England. Edward II himself used it in his personal vendetta with his father's treasurer, Walter Langton, bishop of Coventry and

<sup>129</sup> *RP* i. 376 (nos. 43–5), ii. 396 (no. 105).

<sup>130</sup> Harding, 'Plaints and Bills', 78–81; Sayles, *Functions of the Medieval Parliament*, 47, 155–6, 164, 319.

<sup>131</sup> *Ibid.* 140–1.

<sup>132</sup> *RP* i. 290; cf. an earlier attempt to restrict the use of commissions of oyer and terminer, see the Statute of Westminster II, c. 29 in *EHD* iii. 445.

Lichfield, instructing his chancellor and justices to employ 'all the ways and means by which one can trouble the said bishop by the law and custom of our realm', especially by getting commissions of oyer and terminer sued out against him.<sup>133</sup>

The king and council tried to curb lawlessness by mounting general oyer and terminer commissions. From 1259 onwards the itinerant justices were given power 'to hear and determine complaints of trespasses', but the general eyre which had carried the burden of judicial administration in the counties since the 1160s was unequal to the new challenge. When Edward tried to conquer Scotland in the 1290s and diverted some of his justices to its administration, the eyre ground to a halt. There were to be one or two further eyres in London and Kent, with their rolls of 'pleas by plaints and bills' (*placita de querelis et biletis*) or *de querelis et transgressionibus* (35 membranes in the London eyre roll of 1321, to the same number of 'pleas by writs').<sup>134</sup> In the rest of the country, however, bill jurisdiction passed to justices of trailbaston, the court of King's bench, and justices of the peace. The commission of trailbaston, first issued under an ordinance of the Lent parliament of 1305, looks as if it was devised to take over the bill jurisdiction of the eyre, expanded by concern for the evils caused by the demands of the Scottish war. Bills came into king's bench because the court was used as a makeshift eyre in the early fourteenth-century crisis of order. In 1305 the justices *coram rege* were used as justices of trailbaston and assize in the home counties: in Kent they dealt with 21 membranes-worth of civil pleas and 15 membranes-worth of trespasses by *petitionibus et querelis* or *querelis et biletis*. In 1323 the court was given a permanent trailbaston commission throughout England, and by 1336 it had a separate division to cope with bills.<sup>135</sup>

The influence of bills in creating 'a co-ordinated judicial and constitutional whole' (J. E. A. Jolliffe's words) went further.<sup>136</sup> The bills of the mass of people complaining of trespasses against the peace were naturally submitted to the 'keepers of the peace'. In the later thirteenth century these *custodes pacis* were appointed only occasionally, two per county, for policing purposes in times of emergency. In the fourteenth

<sup>133</sup> Harding, *The Law Courts of Medieval England*, 86–92; R.W. Kaeuper, 'Law and Order in Fourteenth-Century England: The Evidence of Special Commissions of Oyer and Terminer', *Speculum*, 54 (1979); *Records of the Trial of Walter Langeton, 1307–1310*, ed. A. Beardwood, Camden Soc. 4th ser. 6 (London, 1969); Sayles, *Functions of the Medieval Parliament*, 339–41.

<sup>134</sup> Jacob, *Studies in the Period of Baronial Reform and Rebellion*, 70; Harding, 'Plaints and Bills', 76–7, 82.

<sup>135</sup> 'Early trailbaston proceedings from the Lincoln roll of 1305', ed. A. Harding in *Medieval Legal Records edited in memory of C. A. F. Meekings*, general editors R. F. Hunnisett and J. B. Post (London: HMSO, 1978).

<sup>136</sup> Jolliffe, 'Some Factors in the Beginnings of Parliament', 137.

century commissions of the peace were issued with increasing frequency to a growing number of gentry in each shire, and the duty of hearing complaints was more often accompanied by the power to try those accused. The government experimented with levels of commissions of oyer and terminer, using trailbaston visitations as a drastic and unpopular last resort, sometimes giving jurisdiction in the counties only to magnates. But after 1361 gentry *custodes pacis* always received full powers of oyer and terminer in criminal cases, under the supervision only of the circuit justices of assize, and can rightly be called 'justices of the peace'.<sup>137</sup> One influence in the establishment of the JPs, the effective rulers of the English counties until the nineteenth century, were the petitions of the commons in parliament such as that of 1344 asking that the 'new inquiries' they themselves had asked for in the previous year should be abandoned, because the outrageous fines and ransoms imposed in them were more to the destruction than the amendment of the people: the king should remember that fines and amercements profited the lords of franchises rather than the royal treasury, and appoint half a dozen *custodes pacis* in each county to punish offences reasonably according to their gravity. If the series of parliamentary petitions, statutes, and judicial commissions are taken together, local justice and not taxation is seen to be the first great subject of political discussion between the king and the people at large.<sup>138</sup>

The replacement of the criminal jurisdiction of the eyre by justices drawn from the same gentry class that sent the county representatives to parliament was a final product of the 'bill revolution'. A clerkly administrative culture using Latin documents gave way before the more political style of the French-speaking aristocracy. The plaints and bills produced by litigation became a great new means of political communication flowing now from localities to government. The contrast with the developments surrounding the French *parlement* was that other central courts existed in England to mop up the ordinary run of plaints, and parliament was left the space to treat exceptional grievances as political issues. Elected knights of the shire and burgesses, irrelevant to parliaments in which the king's council dealt with the petitions of individual subjects, learnt to support and press petitions they recognized as of general concern. So in 1372 they would seek an ordinance to disqualify 'men of law' from election as knights of the shire in parliament, because they put forward petitions in the name of the commons which

<sup>137</sup> A. Harding, 'The Origins and Early History of the Keeper of the Peace' *TRHS*, 5th ser. 10 (1960); id., 'The Revolt against the Justices', in *The English Rising of 1381*, ed. R. H. Hilton and T. H. Aston (Cambridge UP, 1984), 169, 171, 173; A. Musson, *Public Order and Law Enforcement: The Local Administration of Criminal Justice 1294-1350* (Woodbridge, 1996), esp. 50-1.

<sup>138</sup> *RP* ii. 201 (no. 11), 228 (15), 238 (13) etc.

were actually on behalf of private clients.<sup>139</sup> In the 'good parliament' four years later they brought the collective prosecution against Lord Latimer and others of the king's servants which is regarded as the first true example of impeachment, though the trial of Bishop Langton in 1307 had shown the essential characteristics of the process: the presentation of petitions and the trial of the accused by his peers, which gave commons and lords complementary functions in a bicameral assembly.<sup>140</sup>

#### STATUTE-MAKING

The presentation on behalf of the community of bills which the king might turn into statutes was, however, the function which made the representatives of the shires and boroughs an essential element of parliament. Though the king could always make law by simple ordinance, royal assent to collective petitions from the commons became the normal form of legislation, and the great majority of the earliest statutes made this way concerned the administration of justice. The first English collections classify as 'provisions', not 'statutes', the articles of Magna Carta (the *provisiones de Runnymede*), the legislation of King Henry and his council at Merton in 1236 on the rights of widows and other feudal matters, and the baronial reforms of 1259 also directed at the concerns of landholders as they were re-enacted in the king's name at Marlborough in 1267.<sup>141</sup> Statute-making as the essential and continuous activity of the king was recognized to have begun in England only in 1275 'with the établissements made by King Edward the son of King Henry at Westminster at his first general parliament after his coronation, out of his great concern for the state of his realm and the state of holy church, by [the advice of] his Council, and with the assent of the Archbishops, Bishops, Priors, Earls, Barons, and the Community of the land there summoned'. The significance of the occasion was not missed by the chronicler Thomas Wykes, who writes that Edward wished to restore the laws which had long been dormant through the impotence of his predecessors, or had languished because of the tumult in the country, and therefore sought the advice of legal experts on the drafting of statutes which would remedy the situation and yet be consonant with existing law. Ten years later, Wykes tells us, there had to

<sup>139</sup> *RP* ii. 310 (no. 13), 323 ff.

<sup>140</sup> *Ibid.* ii. 323 ff.; Harding, 'Plaints and Bills', 78–9.

<sup>141</sup> *SR* i. 1, 7, 8, 12, 19; *Close Rolls*, 1254–6, 429; *Select Cases in the Court of King's Bench*, iii, pp. xi ff.; V. H. Galbraith, 'Statutes of Edward I', in *Essays in Medieval History presented to Bertie Wilkinson*, ed. T. A. Sandquist and M. R. Powicke (Toronto, 1969), 177–8, 182, 184.

be another and longer debate in parliament *de statu regni*, during which the king replaced some of his previous statutes which had been found unclear, so that the first statutes of Westminster were followed by 'the statutes of Westminster the second'.<sup>142</sup> Before the end of the century, the chancery clerks felt the need to keep their own roll of the growing body of statutes, the early part of which was written up retrospectively. As it survives, it begins with 'the supplementations to the law' made at Gloucester in 1278 rather than the statutes of 1275, but it is likely that the first membranes of the roll have been lost.<sup>143</sup>

It took time for the Commons to learn to petition for new laws and for the king to realize that he could harness their collective concern. Many of the detailed amendments of the law in the one-hundred-odd chapters of the two Statutes of Westminster look to have been responses to the individual complaints about royal and baronial officials collected by the 'hundred rolls' enquiry. Measures were ordered against bad coroners (I: 10); wrongful distraint (I: 16, 23, II: 2, 36, 37); disseisin, maintenance of law-suits and extortion by officials, and their forcing of the poor and decrepit to serve on juries (I: 9, 19, 23–6, 28, 30, 32, 33, 38; II: 42, 44, 49); magnates and their bailiffs who compelled people to plead cases of breach of covenant and trespass before them, which were outside their jurisdiction (I: 35, II: 43); and false accusations of felony and false imprisonment (II: 12, 13). Other chapters regulating procedure and extending remedies in civil cases may have been the result of individual petitions to king and council in parliament, for example: the protection of wards against the wasting of their inheritances by guardians (I: 21, 22, 48, II: 14, 15); the extension of the action of novel disseisin to allow the recovery of goods as well as tenements (I: 37); the restriction of essoining—the delaying of suits by excuses for non-appearance (I: 43–5, II: 17, 27); the proscription of collusive suits in which the tenants defaulted to allow land to pass into 'the dead hand' of a church, thus depriving overlords of their dues and contravening the Statute of Mortmain of 1279 (II: 32); and requirements that litigants deliver their writs to the court within a specified time from the beginning of the eyre (not waiting till their adversaries had left), and that sheriffs acknowledge the receipt of writs on which they must take action (II: 10, 39).<sup>144</sup>

<sup>142</sup> SR i. 26, 45, 51, 55, 71; the chronicle of Thomas Wykes in *Annales Monastici*, ed. Luard, iv. 263, 304.

<sup>143</sup> The statute roll is Public Record Office C74/1; analysed by H. G. Richardson and G. O. Sayles, 'The Early Statutes', *Law Quarterly Review*, April and October 1934, 201–3; 209–17.

<sup>144</sup> Sayles, *Functions of the Medieval Parliament*, 141; the numbering of the clauses of the Statutes of Westminster is that given in *EHD* iii. 397–410, 428–57; cf. T. F. T. Plucknett, *The Legislation of Edward I* (Oxford: Clarendon Press, 1949).

The clearest connection between ‘parliamentary’ petitioning for justice and the making of the first statutes appears in the chapters of the Statutes of Westminster concerned with the framing of writs. Instead of telling petitioners to try their luck with the chancellor, the king provided by statute a new writ of entry *sur disseisin*, so that where a disseisor had died a tenement could still be recovered from his heir (I: 47), and extended remedy by the writ of novel disseisin, because it was ‘so speedy’, to ‘more cases than before’, such as the recovery of rights to take tolls or gather nuts in a wood (II: 25); he strengthened the writs for obtaining a widow her dower (I: 49, II: 4), and provided a new writ to reclaim lands of her inheritance lost by her husband ‘whom in his lifetime she could not gainsay’ (II: 3); and he ordained writs to prohibit guardians from wasting their wards’ property, and to execute enrolled contracts and bonds without the need of pleading (II: 14, 45). In this respect, two chapters of Westminster II were of particular significance. Chapter 1, *De donis conditionalibus*, provided writs to ensure that ‘conditional gifts’ (entails of land to specific lines of heirs) descended as prescribed and were not sold by the first donees—these in addition to ‘the writ whereby the donor has his recovery when issue fails [which was already] in common use in the chancery’. By c. 24 the chancery clerks were instructed to frame a new writ on their own initiative ‘in a similar case [to that covered by an existing writ] involving the same law and requiring similar remedy’, and refer the matter to parliament only when they could not agree.<sup>145</sup> In parliamentary *placita* of 1290 and 1291 the king’s councillors can be found ordering the rolls to be searched for judgments ‘in a similar case’ (*in consimili casu*). The Statute of Consultation, made in the same year after a petition from ‘many people’ (*plures de populo*), gave the chancellor and chief justice the power to reconsider cases blocked in the church courts by royal writs of prohibition and authorize their resumption if the only remedy was found to be an ecclesiastical one: a graphic illustration of the way statutes could weld the courts of king and church into one system of justice.<sup>146</sup>

The legal ordering of the realm by statute gained impetus in the period when the bulk of ‘parliamentary’ petitions were from individuals (many of these for favours, of course, not legislation). When some begin to be attributed to ‘the community of England’, at first it is clearly the lords who are meant, but a statute of 1293 supplementing the chapter of Westminster II about appointing ‘sufficient’ people to juries was granted on ‘the public and frequent complaint of middling people’.<sup>147</sup>

<sup>145</sup> EHD iii. 428 for ‘of conditional gifts’, 443 for ‘in a similar case’.

<sup>146</sup> RP i. 12 (no. 57), 13 (62), 32–3, 39b, 46 (1), 47 (28), 52 (81), 67b; cf. EHD iii. 464, and *Select Cases in the Court of King’s Bench*, iii, p. lxxiv for the Statute of Consultation.

<sup>147</sup> RP i. 117a.

Increasing numbers of petitions were coming from local communities, e.g. 'the poor and middling people of the county of Norfolk', or men imprisoned in Canterbury and Maidstone gaols on what they said were malicious indictments of homicide, and some of these were very likely brought up by shire or borough representatives.<sup>148</sup> In the fourteenth century the number of individual petitions fell away from a peak of 500 or so (from Scotland, Ireland, and Gascony as well as England) in the Lent parliament of 1305.<sup>149</sup> The representatives of the commons in parliament began to sense their collective influence in the political struggles of Edward II's reign, and to incorporate individual grievances in petitions which they submitted to the king on behalf of the whole community—effectively declaring them 'true bills' as juries did plaints and bills of indictment before justices of trailbaston or *custodes pacis*. The petition of 'the Community of the people of his Realm' to the king in 1315 (*A Nostre Seignur le Roi monstre la Communaulte . . .*) against the indiscriminate issue of commissions of oyer and terminer reads like such a widespread grievance 'avowed' by the Commons as a group; as do the complaints of 'the Community of his land' in the same year (*A Nostre Seignur . . . & a son Consail se pleint . . .*) about the exorbitant tolls at the Humber ferry, and the two-part petition of 1319 x 1322 of 'the Community of his land of England' (*A nostre seignur le roi & a soen conseil pri la communalte*) for a more liberal interpretation of clauses of the forty-year-old Statutes of Gloucester and Westminster II, the first part of this petition evoking the response that it had been answered in two previous parliaments and the second part that 'nothing can be done without a change in the law'.<sup>150</sup>

By the 1320s the Commons in parliament were acquiring an 'agenda for legislation', petitioning repeatedly on a number of issues mainly concerning the administration of justice.<sup>151</sup> The lords and justices continued to advise the king on the answering of petitions, but after the deposition of Edward II in 1327 and the accession of Edward III it is 'the Commonalty of the Realm in the present Parliament', listed separately from the prelates, earls, and barons, which submits petition after petition (*Prie la commune*) 'for the honour of God and Holy Church, and for the enhancement of the state of the Realm' or 'the state of King and Realm', some directed against the fallen regime, some asking for the

<sup>148</sup> Ibid. i. 46 (no. 6), 49 (43), 51 (65, 67, 69, 72), 52 (83: the *pauperes* and *mediocres* of Norfolk), 53 (91), 55 (112), 101 (16), 159 (5), 161 (11, 19, 21), 162 (29), 163 (33–5), 164 (44, 45, 50), 165 (55, 56), 166 (67: the prisoners in Kentish gaols), 167 (72).

<sup>149</sup> R. G. Davies and J. H. Denton (eds.), *The English Parliament in the Middle Ages* (Manchester UP, 1981), 49–52, 62–73, 168, 177–9.

<sup>150</sup> RP i. 290 (8), 291 (10), and cf. 343 (23), 372 (13); *Select Cases in the Court of King's Bench*, iii, p. cxvi; Sayles, *Functions of the Medieval Parliament*, 46–53, 244, 262, 265, 319.

<sup>151</sup> RP 371 (no. 5); W. M. Ormrod, 'Agenda for Legislation, 1322–c.1340', *EHR* 105 (1990).

confirmation of legal provisions going back to the Statute of Marlborough and the baronial legislation of 1258–9.<sup>152</sup> By the end of the fourteenth century many petitions would be addressed to the Commons rather than to the king, who would eventually send bills of his own to be passed through parliament, though the royal will remained the essential element in giving agreed remedies statutory force.<sup>153</sup>

<sup>152</sup> RP ii. 7–12; cf. i. 350b, and Sayles, *Functions of the Medieval Parliament*, 333.

<sup>153</sup> G. O. Sayles, *The King's Parliament of England* (London, 1975), 116–19; A. R. Myers, 'Parliament, 1422–1509', in *The English Parliament in the Middle Ages*, ed. Davies and Denton, 179–80; G. R. Elton, *Reform and Renewal: Thomas Cromwell and the Common Weal* (Cambridge UP, 1973), ch. 4, 'The Instrument'.



## CHAPTER SEVEN

# The Legal Ordering of ‘the State of the Realm’

THIS CHAPTER is concerned with the ways ‘the state of the realm’ came to be structured internally by law, and the remaining chapters of the book will follow the beginnings of its transformation into the ‘modern state’ of the politicians.

## LAW-BOOKS, CUSTOM, AND LEGISLATION

Aquinas’s linking of ‘the state of the regime’ to the ‘state of the people’ by means of legislation fixes on a central theme of thirteenth-century politics. The ‘state of the king and the kingdom’ was understood to need reform as a single entity, and this was why the rules made for ‘the government of the court and of the realm’ provided first of all for the composition of the king’s council which framed new statutes, and for the calling of parliaments which assented to them.<sup>1</sup>

But law-making was a working together of the edicts of rulers and the customs of peoples. The thirteenth century is marked out as the first century of legal state-building not so much by the proliferation of statutes as by the production of a remarkable cluster of national law-books: the treatise ‘on the laws and customs of the realm of England’ once attributed to Justiciar Rannulf Glanvill and composed a decade or so before 1200; the Norman *Très Ancien Coutumier* (1200 x 1204) and *Grand Coutumier* (1254 x 1258); the *Sachsenspiegel* (‘Mirror of the Saxons’) from the 1220s, and the other German ‘mirrors’; the treatise *On the Laws and Customs of England* going under the name of Henry of Bracton (1230s to 1250s); the Welsh law-books, in both Latin and the vernacular; the Castilian *Fuero Real* or *Flores de las Leyes* (1252 x 1255); for France, the *Livre de Jostice et de Plet*, the *Établissements de Saint-Louis*, and Philippe de Beaumanoir’s *Coutumes de Beauvaisis* (c.1280); and into the fourteenth century the Scottish law-book called *Regiam Majestatem*.<sup>2</sup> These descriptions of bodies of law were needed

<sup>1</sup> Cf. above pp. 7, 160, 172.

<sup>2</sup> A conspectus of the law-books can be found in *Handbuch der Quellen und Literatur der neueren europäischen Privatrechtsgeschichte*, i, ed. H. Coing (Munich, 1973).

precisely in order to integrate the new legislation of princes with the legal traditions of peoples.<sup>3</sup>

From Roman times 'decrees' and 'statutes' (the latter glossable as 'the institution of laws') were terms never out of use for the edicts of men in authority, for the constitution-making of classical Roman emperors was kept alive into the middle ages in the service of the Church.<sup>4</sup> The influential writings of Saint Isidore, archbishop of Seville (d. 636), recognized the need of law-making 'for the common utility of citizens'. Charlemagne caused the tribal laws of the Franks (such as the Salic law) to be read out and where necessary amended, so that judges should in future 'judge according to written law and not their own discretion', and a century later the English King Alfred similarly aspired to collect and amend the laws of his predecessors.<sup>5</sup>

Prelates and princes expressed a sense of duty to legislate comprehensively for 'the state of the church and the commonwealth [*respublica*]', and a myth became widespread of the founding of nations by kings who handed down codes of law.<sup>6</sup> The *Sachsenspiegel* made Charlemagne's framing of a *Lex Saxonum* the beginning of Christian Saxony;<sup>7</sup> and the Welsh credited the tenth-century King Hywel the Good with the wholesale promulgation of the *Lex Walensis* at an assembly of local representatives by whose counsel he examined the ancient laws rather as Charlemagne and Alfred had done, renewing some and abolishing others.<sup>8</sup> For one writer, the ninth-century Kenneth MacAlpine was 'called the first king [of Scots], not because he was the first, but because he first established the Scottish laws', though the author of *Regiam Majestatem* claimed that they were promulgated by the great abbey-founder King David I (1124–53), acting 'with the healthful counsel of the whole realm, the people and the clergy'.<sup>9</sup>

<sup>3</sup> A. Harding, 'Legislators, Lawyers and Law-Books', in *Lawyers and Laymen: Studies in the History of Law presented to Professor Dafydd Jenkins*, ed. T. M. Charles-Edwards et al. (Cardiff: U. of Wales P., 1986), 246–8.

<sup>4</sup> Examples in *Formulae Merovingici et Karolini Aevi*, 351 line 5, 352.25, 434.15, 482.25, 590.30 etc.; W. E. Brynteson, 'Roman Law and Legislation in the Middle Ages', *Speculum*, 41 (1966).

<sup>5</sup> *Capitularia Regum Francorum*, ed. A. Boretius and V. Krause, MGH Legum Sectio 2, 2 vols. (Hanover, 1883–90), i. 105; *Die Gesetze der Angelsachsen*, ed. F. Liebermann, 3 vols. (Halle, 1903–16), i. 42–6, 47 (49. 9: Aethelberht of Kent, maker of the earliest English laws, as 'the first of the English to be baptized'); Dorothy Whitelock, 'Wulfstan and the Laws of Cnut', *EHR* 63 (1948), for the ecclesiastical sources of Anglo-Saxon laws.

<sup>6</sup> Geoffrey of Monmouth, *Historia regum Britanniae*, ed. J. Hammer (Cambridge, Mass., 1951), cc. 21–2.

<sup>7</sup> *Sachsenspiegel Landrecht*, K. A. Eckhardt, MGH Fontes Iuris Germanici Antiqui, NS 1, i (Göttingen, 1973), 52; cf. G. Theuerkauf, *Lex, Speculum, Compendium Iuris* (Cologne, 1968), 38 ff.

<sup>8</sup> *The Latin Texts of the Welsh Laws*, ed. H. D. Emanuel (Cardiff: Board of Celtic Studies, 1967), 109.

<sup>9</sup> *The Acts of the Parliaments of Scotland*, i (London, 1844), 597; A. Harding, 'Regiam

Before the thirteenth century the kings of England and France made law not so much by explicit acts of legislation as by the framing of charters and of writs to ensure that their grants were observed. It is probably because their most frequent acts were grants and confirmations of the traditional rights of landholders that early medieval kings have sometimes been regarded as doing no more than declare and amend custom.<sup>10</sup> The revival of 'scientific jurisprudence', and with it a concept of positive law-making, found its immediate expression not in royal statutes but in Gratian's codification of Church law about 1140.<sup>11</sup> His *Decretum* aimed to draw together and harmonize all the *regulae* made for the Church in the course of eleven hundred years. Indeed, he is conscious that he is dealing with an even longer tradition of law-making, which spanned the entire history of human society and stretched from Moses; through Mercurius Trismegistus, Solon, the Twelve Tables, the named laws of Republican Rome such as the *Leges Iuliae* of Caesar and Augustus, the writings of the imperial jurists and the decrees of the Christian emperors Constantine and Theodosius; down to the councils and synods of the medieval Church.<sup>12</sup>

Law-making in this tradition was not for Gratian a random exertion of power: true laws were framed for the common utility of citizens and not for private advantage, accorded with nature and with the usages of the country, and were suitable to the place and the time. Gratian's legislator has the function of developing and correcting the organic body of law of a particular community. Law (*ius*) was made up of laws (*leges*), which were written constitutions, and of long-used customs, but the latter could be taken for law only when written constitutions were lacking. Good customs were laudable and to be followed where they did not contradict law and reason; in particular the customs and traditions of the Church were to be respected, but only if they were truly universal, for 'the locality does not commend the custom, but the custom the locality'. In the eyes of the Church a custom without truth was simply ancient error, and the local and various customs of the people were

Majestatem amongst Medieval Law-Books', *Juridical Review* (1984), 109–10; R. R. Davies, 'The Peoples of Britain and Ireland 1100–1400: III. Laws and Customs', *TRHS*, 6th ser. 6 (1996), 7.

<sup>10</sup> F. Kern, *Kingship and Law in the Middle Ages*, ed. and tr. S. B. Chrimes (Oxford, 1939), is the classic statement of this view.

<sup>11</sup> *Glanvill* and *Regiam Majestatem* both begin with a statement, taken from Roman law, of the legislative responsibility of the ruler: see *Acts of the Parliaments of Scotland*, i. 135; cf. E. H. Kantorowicz, 'Kingship under the Impact of Scientific Jurisprudence', in *Twelfth-Century Europe and the Foundations of Modern Society*, ed. M. Clagett, G. Post, and R. Reynolds (Madison: Wisconsin UP, 1966), 98–9.

<sup>12</sup> Gratian, *Decretum*, ed. E. Friedberg (Leipzig, 1879; repr. Graz 1959), *distinctiones* IV, VII, XV; Gratian found his list of law-makers in Isidore of Seville's *Etymologiae*, V. i; Harding, 'Legislators, Lawyers and Law-Books', 238–9.

often bad, particularly the *consuetudines*, the customary liberties and exactions, of the feudal aristocracy.<sup>13</sup>

Yet 'custom' was the best word to describe the royal grants, procedural rules, and court judgments which made up the emerging bodies of national law. In the plural *consuetudines* meant the rights and exactions permitted to lords.<sup>14</sup> In the singular 'custom' was used by a late Anglo-Saxon tract on 'the rights and ranks of people' for the service required of the peasantry; 'customary tenants' became the term for unfree peasants, just because the level of labour services depended on local need, and 'the laws and customs of countries are many and varied'.<sup>15</sup> From Merovingian times 'custom' had been paired with 'law' to describe the practices, sanctioned by antiquity but varying from place to place, by which husbands endowed their wives at marriage and distributed property to their families and to the church at death.<sup>16</sup> The 'Barbarian Laws' may be seen as Roman law modified by the customary practices of the provinces of the Roman Empire.<sup>17</sup>

The practices of courts were 'custom'. A Frankish formulary cites a 'custom of this place [Tours] and also of the law of earthly justice' that whoever suffers the burning of his property and title-deeds should go into the public court and get two letters certifying what he held *quieto ordine*, one to be put up in the market-place, the other to be shown to king or prince to obtain a new charter.<sup>18</sup> In a Sens formulary there is a written agreement between a vendor and an empor, such as 'reason and custom' demands; a *notitia* certifying, according to 'law and custom', that a killing was in self-defence; and a mandate for the appointment of an advocate in a form 'instituted by laws and preserved over the years (*per tempora*) by custom'.<sup>19</sup>

Peace oaths and judicial ordinances could be seen as additions to custom. The protection of the clergy was both 'an ancient custom' of the

<sup>13</sup> Gratian, *Decretum, distinctiones* VIII, X, XI, XII; G. Le Bras, *Histoire du droit et des institutions de l'église en occident*, vii (Paris, 1965), 399–402, 553–7; *La Coutume: Custom*, Transactions of the Jean Bodin Society for Comparative Institutional History, 52 (Brussels, 1990), especially cap. 3; J. Gaudemet, 'La Coutume en droit canonique'; J. Gilissen, *La Coutume* (Typologie des Sources du Moyen Âge Occidental, Turnhout, 1982).

<sup>14</sup> For examples: *English Lawsuits from William I to Richard I*, ed. R. C. van Caenegem, Selden Soc. 106–7 (London, 1990–1), 7, 254, 617–18.

<sup>15</sup> *Die Gesetze der Angelsachsen*, i. 261.

<sup>16</sup> *Formulae Merovingici et Karolini Aevi*, 16.25, 20.20, 23.15, 24.30, 70.1, 142.20, 163.25, 164.1, 208.1, 210.10, 247.1, 502.5, 539.20, 590.15, 591.25; *Heinrici III Diplomata*, 428; *Conradi III . . . Diplomata*, 133, 261; A. Gouron, 'La Coutume en France au moyen âge', in *La Coutume: Custom*, 196, 199.

<sup>17</sup> P. S. Barnwell, 'Emperors, Jurists and Kings: Law and Custom in the Late Roman and Early Medieval West', *Past and Present*, 168 (2000).

<sup>18</sup> *Formulae*, 151.9, cf. 4.4, 21.31, 28.17, 37.15, 97.15, 48.4, 171.11, 17, 192.7, 216.22; *Die Gesetze der Angelsachsen*, i. 42, 46 (49 and 49.8), 171 (1.2), 320 (15.2) for Anglo-Saxon dooms or *iudicia* which seem to make substantive law.

<sup>19</sup> *Formulae*, 186.5.

German kingdom and 'instituted by emperors', who also confirmed to bishops 'the rule and customs and law' of cathedral cities.<sup>20</sup> By the 'Laws of William', the Conqueror was said to have granted the people of England 'the laws and the customs (*les leis e les custumes*)' that they held under 'Edward his kinsman', promising especially to preserve the peace of the church.<sup>21</sup> A great plea brought by the archbishop of Canterbury in 1072 and heard by the king's command on Penenden heath before the men of Kent, 'particularly the English who were acquainted with the ancient laws and customs', both established Archbishop Lanfranc's landed rights over against Odo of Bayeux and judged 'archiepiscopal customs' in his own lands to be equal to 'royal customs'.<sup>22</sup> After Henry I's death in 1135 the magnates 'did away with the new ordinance' he had promulgated on rights to what could be salvaged from wrecked ships and restored the ancient 'maritime customs and royal liberties' of Battle Abbey, saying that the king might 'change the ancient rights of the country for his own time' but not for posterity.<sup>23</sup>

Under Henry II's assertive rule 'the custom of the king' and 'of the realm' achieved a new definition and came into conflict with the procedures and principles of ecclesiastical justice. An earl lost his suit (though brought by royal writ) for the advowson of a living into which he said a clerk had been intruded 'against the custom of the whole church and realm of the English, the king's edict and the ancient liberty of all nobles'. Finding for the monks of Abingdon against an official who tried to seize the community's property into the king's hands along with the deceased abbot's, Justiciar Glanvill said that 'our customs were instituted reasonably and wisely' and the king did not wish to go against them when they were so ancient and just.<sup>24</sup> But whether the Church won or lost, it was secular custom which decided. According to its chronicler, the abbey of St. Albans lost property in Luton because a local jury was swayed by witnesses whose evidence was 'admitted by the custom of the country', even though their wickedness was obvious to all.<sup>25</sup> In 1164, in the so-called 'Constitutions of Clarendon', Henry II deliberately set 'the acknowledged customs and privileges of the realm' against the liberties claimed by Becket for the clergy, and was careful to add that there were 'many other great customs and privileges pertaining

<sup>20</sup> For examples: *Conradi III . . . Diplomata*, 136, 299; *Friderici I Diplomata*, 1181-90, 34, 56-7, 60, 62-3, 73-5, 93, 96, 112, 170.

<sup>21</sup> *Die Gesetze der Angelsachsen*, i. 317, 319, 487, 492, 525.

<sup>22</sup> *English Lawsuits*, 8-9.

<sup>23</sup> *Ibid.* 255-6.

<sup>24</sup> *English Lawsuits*, 353 (no. 395), 618 (no. 570), and cf. 344 (no. 381: 'the custom of the realm'), 355, 549 (no. 495), 558 (no. 506: the ordeal of hot iron as custom of the realm).

<sup>25</sup> *Ibid.* 468 (no. 436).

to holy Mother Church and to the lord king and the barons of his realm which were not in that document'.<sup>26</sup> In 1195 King Richard I insisted that a long drawn-out dispute about the abbot of Crowland's marsh be decided 'according to the custom of England', meaning the procedures of his courts.<sup>27</sup>

It was an effective strategy for Henry to appeal to custom in his conflict with Becket, because in England as in France and elsewhere the customary rights of the crown, churches, and communes, and local practices concerning marriage-contracts, the endowment of wives, and the making of wills, were being turned by the selective enforcement of kings and an embryonic legal profession into coherent bodies of territorial law. To the statute-making of the universal church could be opposed a supposedly ancient and unwritten customary law which was the heritage of a particular people, though in fact it often consisted of royal edicts of recent date. Glanvill and Bracton asserted that the laws of England, though unwritten, were true laws because they were promulgated by the king with the counsel of his magnates.<sup>28</sup> In the *Sachsenspiegel*, Eike von Repgow insists that the papal legislation altering the prohibited degrees of matrimony cannot make right what the German law of inheritance rejects,<sup>29</sup> and Bracton gives prominence to the declaration of the English barons at Merton in 1236 that they 'would not have the laws of England changed' to comply with the principle of canon law deeming children born out of wedlock to be legitimized by their parents' subsequent marriage and so (contrary to feudal custom) able to inherit.<sup>30</sup> The compilation of 1272-3 known as *Les Établissements de Saint Louis* has the great king insisting in his orders to his *baillis* that justice be done to plaintiffs 'according to the customs of the locality and the country' (*selonc la coustume dou pais et de la terre*).<sup>31</sup> Compiling his *Summa Theologiae* at the same period, Aquinas judged promulgation in writing by the governor of the community as ultimately essential to law, but accepted that the customary practices of the people showed that conjunction of will and reason which was also necessary to valid law-making.<sup>32</sup> The political struggles of early modern Europe would reinforce the idea that law was best made by the people out of their wisdom and experience, 'like a silk worm that formeth all her web out of her self': the written laws were

<sup>26</sup> Stubbs, *Charters*, 164-7; cf. *English Lawsuits*, 410, 428, 433-57.

<sup>27</sup> *English Lawsuits*, 683-4.

<sup>28</sup> Davies, 'The Peoples of Britain and Ireland: Laws and Customs'; Glanvill, ed. and tr. Hall, 2; Bracton on the Laws and Customs of England, tr. Thorne, ii. 19.

<sup>29</sup> *Sachsenspiegel Landrecht*, ed. Eckhardt, 76 (I, 3. 3).

<sup>30</sup> Bracton on the Laws and Customs of England, tr. Thorne, iv. 296.

<sup>31</sup> *Les Établissements de Saint Louis*, ed. P. Viollet (4 vols., Paris, 1881-6), ii. 414-15, iv. 265, 309-10.

<sup>32</sup> Aquinas, *Summa Theologica*, I-II, q. 97, art. 3.

not true laws which were framed 'by the Edicts of Princes or [even] by Councils of Estates' and 'imposed upon the Subject before any Trial or Probation made, whether the same be fit and agreeable to the nature and disposition' of the people.<sup>33</sup> For Lord Stair, writing his *summa* of the *Institutions of the Law of Scotland* (published in 1693), the statutes were best which were simply 'approbationary or correctory of experienced customs', because customary law grew by obliterating outdated ways from memory while 'in statutory written law, the vestiges of all alteration remain . . . and become labyrinths'—witness 'the rambling state of English law'.<sup>34</sup>

It was thus as the tried and tested customs of peoples that the first national systems of law were justified against Roman law and canonical legislation, though in fact they rested largely on the will and authority of kings and imported many elements of the 'learned laws'.<sup>35</sup> A chronicler records that Henry II decreed for Normandy 'the statute and custom' (*hoc statutum et consuetudinem statuit*) that vassals should not be distrained for the debts of their lords; and the Norman *Très Ancien Coutumier* contains a number of clearly legislative acts of the twelfth-century dukes, indicated by phrases such as *communi consilio et assensu statutum est*.<sup>36</sup> By 1200 the fast-developing procedures of English law could be described as *consuetudo regni* or *consuetudo Anglie*.<sup>37</sup>

In England 'provisions' was the favourite term for legislation by king and barons in Henry III's reign,<sup>38</sup> and 'statute' triumphed in the reign of Edward I as a cognate of *stabilimentum*, *établissement*, a French term for an ordinance, which looks as if it was derived from the order at the end of royal charters that the grants should be established (*stabilire* or *stabilitatis obtineat munimentum*) for all time coming.<sup>39</sup> In France law-making by grants of 'liberties' or abolition of 'bad customs' in favour of particular, most often ecclesiastical, beneficiaries (grants which, despite the public witnessing and assurance of perpetuity, required submission

<sup>33</sup> Sir John Davies, *Irish Reports* (London, 1674), preface.

<sup>34</sup> James, Viscount of Stair, *The Institutions of the Law of Scotland*, ed. D. M. Walker (Edinburgh and Glasgow UPs, 1981), 83–4.

<sup>35</sup> For statements of the source of Imperial laws see *Constitutiones imperatorum et regum* 1325–1330, 519.10 and *Constitutiones* . . . 1345–1348, 182.5; for the vigorous diocesan legislation of the church, especially following the fourth Lateran Council of 1215, see C. R. Cheney, 'Statute-Making in the English Church in the Thirteenth Century', *Proceedings of the Second International Congress of Canon Law*, 1963, ed. S. Kuttner and J. J. Ryan (Rome, 1965).

<sup>36</sup> Jean Yver, 'Le "Très Ancien Coutumier" de Normandie: Miroir de la législation ducal?', *Revue de l'histoire de droit*, 39 (1971), 342–3.

<sup>37</sup> R. E. Latham, *Revised Medieval Latin Word-List* (London, 1965), 110.

<sup>38</sup> Above, 186.

<sup>39</sup> Assurance of *perpetua stabilitas* was, of course, a general feature of charters: for an indication of its use in Germany, see the index to *Friderici I Diplomata*, 1168–1180, at p. 567.

to successive kings for confirmation) had yielded place under Philip Augustus, Louis VIII, and Louis IX to 'constitutions', 'ordinances', and '*établissements*', which the king *statuit* for the utility of every vassal or all his subjects and promulgated in letters with a general address. The investigation in 1246 of the uncertain customs of Anjou and Maine regarding wardships and reliefs and their subsequent determination by a royal ordinance signals the subordination of local custom to royal control.<sup>40</sup>

As kings took control of their countries' *ius consuetudinarium*, the duty of the jurists who served them became the integration of new legislation with legal tradition in their *coutumiers* and *Rechtsbücher*. The *établissements* of French kings bulk large in Beaumanoir's *Customs of Beauvaisis*, because the *baillis*' primary duty was to enforce royal edicts. The pleading of novel disseisin, we are told, should comply with a *nouvel établissement* of 1277, and sworn witnessing with Saint Louis's ordinance of 1260 and not 'the ancient custom'.<sup>41</sup> 'The general custom concerning dower' is traced by Beaumanoir to an ordinance of Philip Augustus.<sup>42</sup> The intention of *établissements* was not to take away anyone's rights but to see things done in accordance with reason, abolishing bad customs and carrying forward good ones. But it was no longer open to a baron to allow burgesses to have fiefs within his lands, as it would have been if King Philip III had made the ordinance on the matter only for his own domain: this was a general *établissement* promulgated at an exceptionally large council meeting and for the common profit, and should run throughout the realm.<sup>43</sup> The unrestricted bloodfeud, the wreaking of vengeance on a felon's kin, was deemed too malign a custom, and King Philip (so Beaumanoir tells us, though there is no record of it) made another *établissement* that the implicated kinsmen, if they were not present at the actual misdeed, should have forty days of truce to decide whether to fight or buy peace.<sup>44</sup>

The biggest English law-book, 'Bracton' *On the Laws and Customs of England*, exploits a quite new mass of material which had not been available to *Glanvill*, almost five hundred cases from the plea rolls of the king's courts, in order to represent the new law that was being made all the time by the devising of writs and judicial pronouncements upon them as well as by explicit legislation like that by king and barons at

<sup>40</sup> *Ordonnances des Roys de France*, i. 1-11, 15, 22-3, 35, 38, 44, 55, 58; *Les Enquêtes administratives d'Alfonse de Poitiers*, 349 (nos. 493, 494, 497).

<sup>41</sup> Beaumanoir, *Coutumes de Beauvaisis*, i. 39-40 (§51), 90 (§176), 103 (§205), 116-17 (§227), 367-8, 485, 497-8, ii. 104 (1165), iii. 70.

<sup>42</sup> *Ibid.* i. 212 (§445), iii. 70.

<sup>43</sup> *Ibid.* ii. 256-7 (§1496-§1499).

<sup>44</sup> *Ibid.* ii. 371-2; 379 (§1722).



Merton in 1236. It has been suggested that the famous *addiciones* to *Bracton* may be citations of old cases removed from the original text to the margin by revisers who found that the development of the law had made them obsolete, and then restored selectively and variously to the body of the text by copyists who took them for new material.<sup>45</sup>

*Bracton*, it seems, cannot be the work solely or mainly of the judge Henry of Bracton who wrote in the 1250s and died in 1268, because the law it contains is basically of the 1220s and 1230s, supplemented (but not systematically revised) at later points in different 'voices'.<sup>46</sup> Similarly, the dating and attribution of the late thirteenth-century work that goes under the name of *Britton* is contested, because the treatise pieces legislation produced over a period of time into a static picture of the English legal system. This work claims to fulfil a royal commission to reduce to writing 'such laws as have heretofore been used in our realm', which are to be 'observed in all points, saving to us the power of repealing, extending, restricting and amending them, whenever we shall see good, by the assent of our earls and barons and others of our Council; saving also to all persons such customs as by prescription of time have been differently used, so far as such customs are not contrary to law'.<sup>47</sup>

As in 1275 in his first 'parliament general' Edward I legislated to 'set to rights the state of his kingdom' of England, and in 1284 decreed a new legal order to stand in conquered Wales, so in 1305, after a decade of trying to subdue the Scots, he ordained *super stabilitate terrae Scotiae*. His lieutenant in Scotland was told to call together the people, 'read over the laws that King David made' and 'the amendments and additions which have been made since by kings', and 'reform and amend the laws and customs which are clearly displeasing to God and to reason'.<sup>48</sup> The compilation of *Regiam Majestatem* may possibly have stemmed from that order, but it is more likely that the Scottish law-book (like the Welsh laws earlier) was drawn up in repudiation of English legal imperialism, in which case it fits a date after Robert Bruce's victory at Bannockburn in 1314, and the 'Royal Majesty' that sanctions good laws belongs to the king of Scots. Book I of the work

<sup>45</sup> *Glanvill*, pp. xxxiv-xxxv; *Bracton*, tr. Thorne, ii, 19, iii, pp. xxii, xxxi, xxxvi, xlv; iv, 296-7.

<sup>46</sup> P. Brand, 'The Age of Bracton', in *The History of English Law: Centenary Essays on Pollock and Maitland*, ed. J. Hudson (Oxford UP for the British Academy, 1996).

<sup>47</sup> *Britton*, 2 vols. ed. and tr. F. M. Nichols (Oxford: Clarendon Press, 1865; repr. Holmes Beach, Fla., 1983); for the administrative career of John le Breton, overlooked by F. W. Maitland in the *Dictionary of National Biography*, see the *Close Rolls* of Henry III and the *Calendars of Patent Rolls*, and for confirmation of the identity of the sheriff with the bishop, the Memoranda Rolls at the time of his death: PRO E159/50, m. 10 and E368/36, membranes. 14d, 22, 22d.

<sup>48</sup> *Statutes of the Realm*, i. 55.

seems in fact to incorporate one of the statutes which Robert I *ordinavit, condidit et stabilivit* 'in full parliament' at Scone in 1318, for 'the amending of his land and defence of his people and for the peace of his land' and with the assent of 'the whole community'.<sup>49</sup>

Though the legislative power of rulers was justified as the means of answering the needs and petitions of their peoples, both Aquinas and Beaumanoir see it as ultimately free from human restriction. Beaumanoir says that in time of war or fear of war accustomed law may be overthrown and the king 'make new *establissemens* for the common profit of his realm', for 'the time of necessity excuses him':<sup>50</sup> the example he gives is the conscription of simple squires to serve as knights in the defence of their country—something which we know Edward I did for his Flemish expedition in 1297, to the outrage of the English baronage.<sup>51</sup> For all his insistence that laws are only just when they are ordained to the common good, equal in the burdens they impose on subjects, and within the power of the lawgiver to make (otherwise they are mere violence and do not bind in conscience), Aquinas has to admit that even an unjust law, if 'framed by one who is in power' and governs 'the community of the state' [here *civitas*], is 'derived from the eternal law, since all power is from the Lord God'; a man 'should even yield his right' to it in order 'to avoid scandal and disturbance'. The political order has its own values. The end of the state is its own preservation, for which the ruler makes law, and also interprets and dispenses from it. Dispensations are justified by the 'necessity which knows no law'. The force of the idea of necessity of state comes from the analogy made in Aquinas's scheme of legislation and dispensation between the natural necessity of a starving individual, who may steal to preserve his life, and the artificial necessity of the community, to preserve which the ruler may even dispense with his subjects' property rights.<sup>52</sup>

<sup>49</sup> *Acts of the Parliaments of Scotland*, i. 122, 466, 471–2; W. E. Brynteson, 'Roman Law and Legislation in the Middle Ages', *Speculum*, 41 (1966); A. A. M. Duncan, 'Regiam Majestatem: a Reconsideration', *Juridical Review* (1969), 210–14; Harding, 'Regiam Majestatem amongst Medieval Law-Books'.

<sup>50</sup> Beaumanoir, *Coutumes de Beauvaisis*, ii. 261–3.

<sup>51</sup> F. M. Powicke, *The Thirteenth Century*, 2nd edn. (Oxford UP, 1962), 679.

<sup>52</sup> Aquinas, *Summa Theologiae*, I–II, q. 96, art. 6, conc., q. 97, art. 4, conc., II–II, q. 32, art. 7 ad 3, q. 66, art. 7; A. Harding, 'The Reflection of Thirteenth-Century Legal Growth in Saint Thomas's Writings', in *Aquinas and Problems of his Time*, ed. G. Verbeke and D. Verhelst (Leuven, 1976), 33–4.

## THE LAW OF LAND-HOLDING

The *acta* of kings from Frankish times and the *stabilimenta* and statutes of the thirteenth century ordered the state of the realm first of all in terms of property-holding. It long remained a basic tenet that the absolute power of kings to rule was balanced by the sanctity of private property, so that taxation required consent, and rulers like Richard II of England who were seen to interfere arbitrarily with their subjects' property courted disaster. Yet the making of laws to protect property rights inevitably converted the strength of family and lord-vassal relationships into the authority of the state over individual proprietors. As in the early years of classical Rome, so in the lands settled by the Germanic peoples, men learnt that the essential characteristics of ownership (*dominium*) were on the one hand inheritability and on the other the power of the current holder to dispose of the property free from family obligations.<sup>53</sup>

The 'power to alienate land', wrote Maitland, 'is one that has descended from above. From all time the king has been the great land-giver. The model gift of land has been a governmental act; and who is to define what may or may not be done by a royal land-book, which, if it is a deed of gift, is also a *privilegium* sanctioned by all the powers of church and state?'<sup>54</sup> From an early date kings granted lands *iure proprietatis* to privileged individuals which gave them the right to alienate them out of family ownership and also to determine how they should descend to future generations. A formulary of Louis the Pious's reign has the style for an 'imperial gift' to two Saxon *fideles*: the emperor transfers lands across the Elbe 'from our right' to the 'hereditary right' of the donees, with 'free and secure power' to clear them of the Slav occupants and do with them what they wished.<sup>55</sup> A little later King Aethelwulf of Wessex even sought the consent of his bishops and chief men to the 'booking' of lands at South Hams in Devon 'to himself into his own inheritance', so as to be able 'to leave [it] eternally to anyone whatever as it may be pleasing to him'.<sup>56</sup>

Kings had a particular obligation to protect the property rights of their subjects, above all of churches. Thus, the Emperor Frederick I took

<sup>53</sup> E. Levy, *West Roman Vulgar Law* (Philadelphia, 1951), 64–72.

<sup>54</sup> Pollock and Maitland, *History of English Law* [HEL], ii. 12.

<sup>55</sup> *Capitularia Regum Francorum*, i. 153.8 (cases *de proprietate aut libertate* are ordered to be heard only in the presence of imperial *missi* or counts), ii. 240; *Formulae*, 288–9, and cf. 54, 137, 147–8, 150, 208, 271; *Recueil des Actes de Charles le Chauve*, i. 17, 20, 26, 28, ii. 22, 243 etc., iii. 334–5, 372; *Lotharii I et Lotharii II Diplomata*, 53.40, 74.4, 105.19, 117.11, 17, 128.32, 173.26, 178.20, 205.30, 212.9, 253.6, 279.8, 405.29 etc.

<sup>56</sup> *EHD* i, ed. Whitelock, 481–3, 499, 531, 538; Susan Reynolds, *Fiefs and Vassals* (Oxford UP, 1994), 59–73.

monasteries and their lands under his protection; established (literally 'stabilized') liberties, in one case of 'the bishop of the Jews' of Worms; made grants 'in proprietary right' for the most part to clergy, sometimes adding 'hereditary right' and full 'power of disposition (*facultatem disponendi*)' as it was enjoyed by 'other imperial churches'; and confirmed his ministeriales' pious grants of their hereditary property.<sup>57</sup> On the other hand, lay advocates were forbidden to acquire 'in hereditary right', or grant benefices from, the property of the churches they were intended to protect, and an abbot who disposed of his inheritance was enjoined to do so only 'for the greater benefit (*maiori utilitate*)' of his house and by the counsel of his brother canons.<sup>58</sup> The property rights of the church were not to be alienated lightly: they were possessed for higher purposes, and the property of the king was for the same reason on a different plane from that of the baronage. Bishops might be endowed with whole counties by the emperor, but they were not to let the office of the counts they appointed become hereditary. The castles and the lands of a margrave which were 'established' by the emperor as the property of the monastery which the *fidelis* had founded were said to be taken from 'the proprietary right of the kingdom'.<sup>59</sup> Because it was for the imperial majesty always to increase public property (*rem publicam*), not diminish it for the sake of any reason or person, Frederick's grant of lands to his nephew Henry the Lion, duke of Bavaria and Saxony, had to be balanced by Henry's transfer to Frederick of the castle of Baden, along with a hundred ministeriales and other estates, and by the emperor's acquisition, formally approved by the princes, of further lands to be 'the right and property of the kingdom'.<sup>60</sup>

A subject's 'ownership' of property was qualified by the condition, stated or implied, of loyal service to the king in return for the 'benefice and privilege' given him. 'Benefice' was the general term for property bestowed and protected by royal benevolence, ranging from the counties and their jurisdiction delegated to magnates, through the lands with which bishoprics and abbeys were endowed in return for the service of prayers for the king's state, to the holdings given to men of varying status with military service as the underlying obligation.<sup>61</sup>

<sup>57</sup> *Formulae*, 54, 135–6; examples in *Friderici I Diplomata*, 1152–1158, 16, 18–19, 19–22, 46–7, 142–3, 164, 175–6, 180–1, 181–2, 186–7, 285 (the 'bishop' of the Jews of Worms), 323–5, 357–9; 1158–1167, 59–64, 82, 83–4, 110–11, 130–1, 138–9, 166–8, 305, 332, 455–6, 459–60; 1168–1180, 9–10, 11, 92–3, 149, 186–9; 1181–1190, 8, 26, 121–5; 128–31, 181–3, 229, 258–9, 267–8, 504.

<sup>58</sup> *Friderici I Diplomata*, 1152–1158, 119, 121; 1158–1167, 164, 183, 197; 1168–1180, 34–5, 52–37; 1181–1190, 100.

<sup>59</sup> *Ibid.* 1152–1158, 251–3; 1158–1167, 168.15.

<sup>60</sup> *Ibid.* 1152–1158, 332–3; cf. 1158–1167, 53.20..

<sup>61</sup> *Capitularia Regum Francorum*, i. 93 (c.6), 104 (49,50), 131 (6,7), 132 (18), 136 (4), 330

'Feudalism' was a vital stage in the development of a law of property, because it spread the conditional holding of land, and generated the whole legal terminology of 'landlord' and 'tenant'. The *Libri Feudorum* or 'Customs of Fiefs' added in the twelfth century to the *Corpus Juris Civilis* start with the Emperor Conrad II's edict of 1037, *De beneficiis regni Italici*, regulating relationships between the king, the bishops, and the holders of church lands south of the Alps. Intervening to stop a war between the archbishop and the rebellious vavassores of Milan, the Emperor Conrad could do no more than recognize the customary law which had grown up around the granting and holding of benefices further down the social hierarchy. In order to reconcile *seniores* and *milites*, he decreed firstly that a vavassor or lesser knight holding of a bishop, abbot, abbess, margrave, count, or other person who 'had benefices of public or ecclesiastical property' should not be deprived of his benefice except by the judgment of his peers. (His fellow knights would presumably know the conditions on which his tenement had been granted.) But the most important clause of the edict gave the nearest heir of a deceased vassal (son, nephew, or brother) the absolute right to succeed to the benefice. It was to this type of military benefice, by which the grantor retained superior rights but the grantee and his heirs were protected from arbitrary confiscation, that Irnerius and the other masters of the renaissance of Roman law applied the term 'fief' and around it that they constructed the doctrines of *ius feudale*.<sup>62</sup>

The nature of the practical arrangements on which the jurists built 'feudal law' can be gleaned from the language of charters. 'Fief' (*feodum*) followed *beneficium* in emphasizing the beneficiaries' acceptance and consequent 'holding' of the granted properties from superiors.<sup>63</sup> In eleventh-century France 'benefice' and 'fief' were used interchangeably of parcels of comital and vicecomital land and jurisdiction held by private lords, and of the castles from which the property was controlled.<sup>64</sup> The duke of Normandy's 'infeudation' of his domains to secure military support was by grants of *beneficia*; and Orderic Vitalis has duke William, after his coronation as king of England, stationing Frenchmen as custodians of castles and 'distributing rich

(2,5), 331 (11), ii. 330 (3), 343.16, 439.29; *Lotharii I et Lotharii II Diplomata*, 178, 183-4, 205, 252-3, 309-10, 390, 441-2; *Constitutiones*, i. 50, 89-91; *Regum Burgundiae e Stirpe Rudolfina Diplomata et Acta*, ed. T. Schieffer, MGH Diplomata (Munich, 1977), 165.

<sup>62</sup> Reynolds, *Fiefs and Vassals*, 84-102, 477; F. Menat, *Campagnes lombardes au moyen âge* (Rome: École Française, 1993), 563-601.

<sup>63</sup> C. Devic and J. Vaissete, *Histoire générale de Languedoc* (Toulouse, 1872-1904), v, cols. 1061-5; cf. Reynolds, *Fiefs and Vassals*, 192-240.

<sup>64</sup> Devic and Vaissete, *Histoire générale de Languedoc*, v, cols. 366-8, 429-30; J. C. Holt, 'Politics and Property in Early Medieval England', *Past and Present*, 57 (1972), 6-7; K.-J. Hollyman, *Le Développement du vocabulaire féodal* (Geneva and Paris, 1957), 47; Niermeyer, *lexicon minus*, 415-16; Reynolds, *Fiefs and Vassals*, 456.

benefices (*opulenta beneficia*) that induced men to endure toil and danger to defend them'.<sup>65</sup>

'Fief', 'fee', seems to have prevailed over 'benefice' because the word always contained the notion of a payment to the recipient. Perhaps originally signifying a payment for the services of a Carolingian official, it also became useful to churches which needed to emphasize that their grants of land or money were subventions to retainers rather than the outright alienations which canon law frowned upon. A church could apparently be granted to a priest as a *fevus presbiteralis*, and even an archdeaconry be regarded as held *in feudum* from a bishop (and as such be granted to a layman).<sup>66</sup> It became the practice of landlords across Western Europe to endow churches with property and receive it back to be held as fiefs (*feudi oblatis*, *fiefs de reprise*) for the donors' lifetimes or in heredity.<sup>67</sup> Here, perhaps, was where conditions of tenure and (sometimes mutual) dependency were first worked out. At the highest level the count of Cleve gave five estates from his *proprietas* to the bishop of Münster in 1231 and received them back *in feodo*, in order to seal an agreement of mutual aid and defence.<sup>68</sup> In France the practice appears well established for military purposes a century and a half earlier in the charters of King Philip I and duke William of Normandy. A great lord's gift to a church might include, or specifically exclude, the 'knights' fiefs' on the estate. It might be necessary for a tenant *in feodo* to give consent to his lord's grant and his consequent change of allegiance.<sup>69</sup> In Normandy duke William approved in 1066 the arrangement by which five knights of John, bishop of Avranches, should, after his death, hold *in fevio* of the bishopric.<sup>70</sup>

Normandy and the Norman church were exceptional for military enfeoffments: Orderic Vitalis, looking back from the twelfth century to

<sup>65</sup> *Recueil des Actes des Ducs de Normandie*, ed. Fauroux, 130, 140, 149, 152, 154, 164, 172, 246, 276 (*cum beneficiis ad ipsum castrum pertinentibus*), 306, 371, 379, 402, 455, 456, 461; *Recueil des Actes de Philippe Ier.* ed. Prou, pp. 5, 26, 33, 64–6, 149, 180, 263, 353, 422, 437; G. Duby, *La Société aux XI et XII siècles dans la région mâconnaise* (Paris, 1953), part iii, ch. 2; F. Lot and R. Fawtier, *Histoire des institutions françaises*, i. *Institutions Seigneuriales* (Paris, 1957), 13; *The Ecclesiastical History of Orderic Vitalis*, ed. Chibnall, ii. 194, iv. 210.

<sup>66</sup> Lot and Fawtier, *Institutions seigneuriales*, 98, and *Institutions royales*, 49, 195, 234; Hollyman, *Développement du vocabulaire féodal*, 46–7, 52, 59; Niermeyer, *lexicon minus*, 417 (s.v. *feodum*, 12); Devic and Vaissete, *Histoire générale de Languedoc*, v, cols. 198–200 (c.945).

<sup>67</sup> *Recueil des chartes de l'abbaye de Cluny*, 6 vols. ed. A. Bruel (Paris, 1876–94), iv. 813–14; *Recueil des actes de Philippe Ier.*, 108; *Recueil des actes de Louis VI*, i (1108–37), 83; *The Ecclesiastical History of Orderic Vitalis*, ii. 64–5, 152, iii. 156–7; Reynolds, *Fiefs and Vassals*, 50, 179.

<sup>68</sup> Reynolds, *Fiefs and Vassals*, 456.  
<sup>69</sup> *Recueil des actes de Philippe Ier.*, 10, 33, 52–3, 136, 211, 241, 266, 364, 404; *Recueil des actes des Ducs de Normandie*, 285, 367; *The Ecclesiastical History of Orderic Vitalis*, ii. 34–5, 152–5, 156–7; *Recueil des actes de Louis VI*, i. 402, 476, 486.

<sup>70</sup> *Recueil des actes des Ducs de Normandie*, 440.

the early days of the duchy, saw 'barely literate priests of Danish stock' themselves 'bearing arms and holding lay fees by military service'.<sup>71</sup> But references in other areas to 'enfeoffed knights' (*fevales*, *milites feudales*) and to men holding *feodaliter* suggest that feudal tenure was a widespread answer to military needs well before 1100.<sup>72</sup> What is certain is that 'feudalism' came to depend on the authority of kings who moved from the confirmation of the enfeoffments of churches to the incorporation of feudal notions into their systems of government. The uses of grants *in feodum* in the political management of Italy are clear from Frederick I's *diplomata*. A number of margraves, counts, and other magnates were invested with their lands and offices in Italy *per rectum feodum*, the beneficiaries sometimes being recorded as swearing fidelity to the emperor 'as vassal to lord'. A treaty between the emperor Frederick and the count of Barcelona provided for the infeudation of the latter's nephew Raymund with the county of Provence, to be held for a rent of fifteen marks of fine gold payable at Arles every feast of the Purification, the new count's oath of fealty to the emperor against all men, especially the opponents of Pope Victor, and homage and service for the fee; the citizens of Arles were in turn to owe fealty and service to Count Raymund, and the count of Folcalquier to do him rather than the emperor homage.<sup>73</sup>

To his *fidelis*, Arnold of Dorstadt, and his heirs female as well as male, Frederick granted an Italian castle as 'a lawful fief according to German practice (*per rectum feodum secundum morem Theutonicum*)', which suggests that it was in Germany first that imperial fief-giving and feudal hierarchy were important in the constitution of the kingdom.<sup>74</sup> Frederick cited his role as peace-maker and creator of 'an ordered state' (*ordinatum statum*) amongst quarrelling princes as the reason for his confirmation of the count-palatine of the Rhine's restoration of two churches to the archbishop of Trier in return for the archbishop's concession of a castle *in feodum* to the count.<sup>75</sup> A royal act notified Eberhard of Strubenhart's grant to a monastery of a fief bestowed on him by a lord, who had received it from the emperor, who had it from the bishop of Speyer; all three lords approved the gift.<sup>76</sup> The emperor

<sup>71</sup> *The Ecclesiastical History of Orderic Vitalis*, iii. 120, and cf. ii. 82.

<sup>72</sup> Niermeyer, *lexicon minus*, 413.

<sup>73</sup> *Constitutiones*, i. 231; *Friderici I Diplomata*, 1152-1158, 316; 1158-1167, 12, 71, 94, 100, 137, 138-9, 176, 198-203, 220-5, 235, 243-5, 290, 376-9, 389-92; 1168-1180, 229, 283; 1181-1190, 111, 151-2, 197-8.

<sup>74</sup> *Friderici I Diplomata*, 1158-1167, 462-3; for the continued importance of infeudation in Germany, see e.g. *Constitutiones et acta publica imperatorum et regum*, v (1313-24), 898 (index, s.v. *feodum*), and *Constitutiones*, xi (1354-6), 634-5 (*infeudatio generalis*).

<sup>75</sup> *Friderici I Diplomata*, 1158-1167, 174-5; cf. 1152-1158, 128-9, 364; 1158-67, 417; 1168-1180, 49, 272-7.

<sup>76</sup> *Ibid.* 1181-1190, 225-6; cf. 1158-1167, 157.

prized the extra control the feudal relationship gave him over the nobility both ecclesiastical and lay: Henry the Lion was declared in 1180 to have forfeited his duchies of Bavaria and Saxony when he failed to answer three successive summonses to Frederick's court 'according to feudal law',<sup>77</sup> and by the law of 1186 arsonists who did not submit after excommunication were to lose what they possessed *feodali iure*.<sup>78</sup>

Yet imperial politics were too distant from the judging of landholding disputes in the local courts for the language of grants *in feodo* to the high nobility to leave their mark on the German law of property. The clauses in Frederick I's *Landfriede* of 1152 prescribing a way of deciding land cases speak only of *beneficia* (not *feoda*); and the Latin version of the part of the *Sachsenspiegel* entitled in the vernacular *Lehenrecht*, which sets out the rules of the landholding relationship between lords and men, is headed *De beneficiis* and written for those who wish to be instructed *in iure beneficiis*.<sup>79</sup>

It was in France and England that fief-holding had most effect on property law and on the distribution of political power. One of the sixteenth-century French jurists who regarded feudal law as the foundation of their country's ruling aristocracy, and of its independence from the Empire and its Roman Law, claimed to have 'learned that the authors of fiefs were the kings of the Franks, reigning . . . even before the birth of Christ'.<sup>80</sup> Somewhat less imaginatively, but with a measure of anachronism, historians have been accustomed to call a conditional holding in France a 'fief' when the usual term was still 'benefice'. In 1092, however, Philip I is found giving *in fedium* to the archbishop of Rouen and his successors the abbey of Pontoise, to be held in perpetuity from the king and his successors; the king then specifies that 'this will be the service that the archbishop shall do to me for the aforesaid fief, each year he shall come to one of my courts, at Beauvais, or Paris, or Senlis'.<sup>81</sup> On a famous occasion in 1124 Louis VI proclaimed that he himself held the county of Vexin as *feodatus* of Saint Denis, and placed the Oriflamme standard of the counts on the abbey's altar as a pledge to defend his lord and his realm against invasion by the Emperor Henry V: but significantly added that his royal authority prevented him

<sup>77</sup> *Friderici I Diplomata*, 1168–1180, 362.34; cf. 1158–1167, 451–2; 1181–1190, 90–1.

<sup>78</sup> *Ibid.* 1181–1190, 273.14.

<sup>79</sup> *Ibid.* 1152–1158, 43 (cc. 8, 9); *Auctor Vetus de Beneficiis*, ed. K. A. Eckhardt, MGH *Fontes Iuris Germanici Antiqui*, NS 2, ii (Hanover, 1966), 20–1, 58–60.

<sup>80</sup> Charles Du Moulin, quoted by D. R. Kelley, 'De Origine Feudorum: The Beginnings of an Historical Problem', *Speculum*, 39 (1964), 224.

<sup>81</sup> *Recueil des actes de Philippe Ier*, 322; cf. a famous letter from Count Odo of Blois to King Robert II in 1027, complaining of the confiscation of his benefice, without hearing his case and though he had performed his due services: L. Halphen, 'La Lettre d'Eude II de Blois au roi Robert', *Revue Historique*, 97 (1908), 287–96; Lot and Fawtier, *Institutions royales*, 36.



from doing homage to the abbey.<sup>82</sup> Hierarchies of land-holding could reinforce hierarchies of authority, as when the duke of Aquitaine accepted the duty—or claimed the right—to present the count of Auvergne to royal justice, because Auvergne was held from him as he (the duke) held it from the king. But generally land-holding ties were too tangled for purposes of government: kings needed to stand outside feudal hierarchies, and demand that men do them liege homage for their lands against all others.<sup>83</sup>

The Capetians' exploitation of the homage of the kings of England for their lordships in France achieved a great success in 1202–4 when John was judged to have forfeited the fief or fiefs of Normandy, Anjou, and Aquitaine. But equally important was Philip's treatment of fiefs generally as the units of military and fiscal resource of his kingdom, to be granted uniformly *in feodum et hominagium ligium* and listed in his registers.<sup>84</sup> It is likely that Philip learned his feudal regime from the duchy which he conquered in 1204, for the *Feoda* section of his registers begins with the list made in 1172 of 'services [i.e. the quotas of knights from every bishopric, abbey, and lay barony] owed to the duke of Normandy'; continues with the names of the knights holding of the fief of Breteuil and the fief of Grandmesnil 'who had come into the homage of the lord king' in 1204–5, and a comprehensive survey of *Feoda Normannie* in 1207; and concludes with lists from the years surrounding the conquest of Normandy of knights-banneret over a wider area of northern France, 'archbishops and bishops who are under the king of France', 'royal abbeys', 'counts and dukes of the king of the French', 'the king's barons', 'castellans', 'vavassors', 'communes', 'the cities and castles which the king has in demesne' and finally 'the castles held by the king'.<sup>85</sup>

'Feudalism' in France and England can be seen as the prime example of the expression of social and political structures as a law of property. By the later years of the thirteenth century, it was *parlement* which scrutinized feudal relationships in France in the course of deciding property disputes—and not exclusively disputes about landed property, since money rents could also be granted to be held perpetually *in*

<sup>82</sup> Suger, *Vita Ludovici Grossi Regis*, ed. H. Waquet (Paris, 1964), 220; *Recueil des actes de Louis VI*, i, 465–6, and cf. 83, 348, 439–40.

<sup>83</sup> *Vita Ludovici*, 238–40; J. W. Baldwin, *The Government of Philip Augustus* (Berkeley: California UP, 1986), 261–2.

<sup>84</sup> S. D. White, 'The Discourse of Inheritance in Twelfth-Century France: Alternative Models of the Fief in Raoul de Cambrai', in *Law and Government in Medieval England and Normandy: Essays in Honour of Sir James Holt*, ed. George Garnett and John Hudson (Cambridge UP, 1994); Lot and Fawtier, *Institutions royales*, 19–22; *Recueil des Actes de Philippe Auguste*, ii, 292–3, 391, 493 etc.; *Layettes du Trésor des chartes*, 1, no. 412 (pp. 175–6); Baldwin, *The Government of Philip Augustus*, 265 ff.

<sup>85</sup> *Les Registres de Philippe Auguste*, ed. Baldwin, 267–342.

*feodum et homagium ligium*. A good number of *parlement*'s judgments were enforcements of the king's rights to homage and jurisdiction in the fiefs of his tenants-in-chief; or the punishment of unlicensed alienations of royal fiefs, especially into the 'dead hand' of the Church (churches never died, so their fiefs never escheated to the king).<sup>86</sup> In the majority of cases, however, decisions that men be received to do homage to the king were made at their own petition and amounted to judgments that disputed property belonged to them. The court would order lords to receive claimants as their men, and to pay the arrears of money-fiefs for which they had, or ought to have, taken homage; while an heir of the bishop of Soissons who was unwilling to take on the debt-ridden inheritance he had been left was told that, unless he did homage to the new bishop, the latter or the king would sell the land to satisfy creditors.<sup>87</sup> A bishop justified his right as *dominus feodalis* to take back a castle because its knightly tenant had sold it to a burgess, a non-noble; and 'by the custom of France' an abbot and convent claimed another castle held 'of their fee' when the occupant's elder brother was banished for treason.<sup>88</sup> In such matters *parlement* might confirm or overturn decisions of the *bailli*'s court 'of feudal men' (*curia hominum feodalium*).<sup>89</sup> Over succession to fiefs 'the customs of France and principally of the town of Paris' was found to be in conflict with the Romanist *ius scriptum* of the south, which permitted the leaving of land by will to someone other than the nearest heir by primogeniture.<sup>90</sup>

The language of fiefs and homage helped to create 'the custom of France' applied in the late thirteenth-century *parlement* in the same way that in the twelfth century it had formed the *consuetudinem Anglie*, the nascent common law of England. Perhaps the process is simply visible earlier in England because accounting for the number of knights enfeoffed, exemplified in 1086 by the Domesday inquest and in 1166 by Henry II's demand for returns from his tenants-in-chief known as the *Cartae Baronum*, was essential that much sooner to the establishment of the military and fiscal power of the Norman and then the Angevin kings.<sup>91</sup> But from the earliest days of the Conquest lordship was

<sup>86</sup> *Les Olim*, i. 36 (xiii), 137 (x), 167–8, 606 (xiii), ii. 35 (iv), 69–70, 71 (x), 72 (iii), 101–2, 123 (xlix), 137 (xxi), 167 (xxxviii), 232 (xvii), 251 (xiii), 325 (v), 347 (xxxii), 365 (xxxii), 416–17 (i–iii), 505–6, 608–9, 630–1, 636–7; *Layettes du Trésor des Chartes*, 3, no. 4362 (p. 369) for the grant of a *fief-rente* in 1257, *ut ratum et stabile permaneat in futurum*.

<sup>87</sup> *Les Olim*, i. 891 (xxxii), ii. 57 (xii), 83 (xxiv), 117 (xxix), 119 (xxxvii), 148 (xxviii), 201–2, 242–3, 283–4, 328 (xv: the bishop of Soissons' claim), 341 (xix), 343 (xxiii), 353 (ix), 359–60, 420 (xi), 468–9, 484 (iv), 492–3, 500–1 (xi, xii), 504–5, 517–19, 547 (xvi).

<sup>88</sup> *Ibid.* ii. 187–8, 606–7, 616–17.

<sup>89</sup> *Ibid.* ii. 443–4.

<sup>90</sup> *Ibid.* ii. 453–5, 556–8.

<sup>91</sup> D. C. Douglas, *William the Conqueror* (London, 1964), 273–83; *EHD* ii. 903–15; *Regesta Regum Anglo-Normannorum* [RRAN], iii, nos. 68 (p. 26), 111 (p. 40), 391 (p. 150); A. W. B. Simpson, *A History of the Land Law*, 2nd edn. (Oxford: Clarendon Press, 1986), 56.

generally prized as an economic asset, and the fief was evolving into the 'fee simple', the most unconditional form of property recognized by English law. Judgments of the Conqueror's court ordered the abbot of Westminster's French and English tenants to come to an agreement with their lord concerning their fiefs, and the abbot of Evesham to hold his lands of the bishop of Worcester's fee as the bishop's other *feudati* held theirs.<sup>92</sup> Around the end of the twelfth century Jocelin of Brakelond, describing Abbot Samson of Bury St. Edmund's estate-management, would list the rights of 'every lord of a fief owing homage' to escheats, a general aid, 'wardships of boys and bestowal of widows and girls [in marriage] in those fiefs whence he has [himself] received homage'.<sup>93</sup>

With the legal rights of the lord went the right of his tenants to have their homage received for the fiefs which were lawfully theirs. As in Italy and France it was in their lords' courts before the other free tenants that heirs demanded seisin of their ancestors' fees. An English law of property grew from the interventions of the king to make the feudal processes work.<sup>94</sup> A writ of Henry I told Absolon of Sandwich to 'do right' to his lord, the abbot of St. Augustine's, Canterbury, according to the judgment of the seignorial court, or the abbot should recover his fee.<sup>95</sup> Another ordered the sheriff to send 'wise men' to 'the court of the [abbey of Thorney's patron-]saint' to see that right was done to Robert of Staverton, who claimed to hold land in fee farm (i.e. for the service of a money-rent) from the abbey and to have been refused possession by the abbot without a judgment by the court of his freeholders. (Probably the procedure called *tolt* would already have brought the case into the shire court if 'proof of default of right' in the seignorial court had been made to four knights.<sup>96</sup>) In inheritance cases an important distinction had already appeared. The 'Laws of Henry I' show that the heir's right to the ancestral fee (the *primum feodum*) was stronger than to his ancestor's acquisitions, which the dead person could have given away again with his lord's concurrence.<sup>97</sup>

To quote John Hudson, this was already, even before Henry II's innovations, 'not a 'truly feudal world' of land-holding based on personal relationships, but one in which more proprietary notions had an essential place'.<sup>98</sup> Early in Henry II's reign a writ to the bishop of Norwich

<sup>92</sup> *English Lawsuits*, i. 36 (no. 13), 39 (no. 15), 73 (no. 88), 176-7 (no. 206);

<sup>93</sup> *The Chronicle of Jocelin of Brakelond*, ed. and tr. H. E. Butler (London, 1949), 105.

<sup>94</sup> *English Lawsuits from William I to Richard I*, i. 52-88 (for the disputes about who held land from whom recorded in Domesday book), 162 (no. 194), 191 (no. 225), 222-3, 228-9, 237 (no. 281).

<sup>95</sup> *English Lawsuits*, 155-6; *Glanvill*, 139-40.

<sup>96</sup> *Leges Henrici Primi*, ed. Downer, 160 (§48, 10, 11), 197 (§61, 13b), 225 (70, 21-21a); cf. above, 184 and 335-6.

<sup>97</sup> John Hudson, 'Anglo-Norman Land Law and the Origins of Property', in *Law and*

ordered him to return a church to the abbot of Hulme's fee, if the abbot could show that it had been transferred to the fee of another without judgment since the death of King Henry I; 'and unless you do it, the archbishop of Canterbury shall'.<sup>99</sup> In another case heard 'by the command of the king' in the court of the archbishop of Canterbury concerning lands belonging to the archbishop's manor of Wimbledon and Barnes, one Peter claimed possession from the canons of St. Paul's because he said his father had it on the day King Henry I died, and then his mother until she was ejected by force: but because he made no mention of a fee or inheritance, the court denied him seisin, without prejudice to the question of right.<sup>100</sup> In the action of mort d'ancestor described by 'Glanvill' a jury was required to say before the king or his justices whether the demandant was the 'next heir' of his father, and whether the latter had died since 'the king's first coronation . . . seised in demesne as of fee' of the tenement in question (i.e. had been in actual occupation of it as heritable property). If he was unsuccessful in gaining seisin by this 'petty assize', the demandant could nevertheless seek to prove that the land was his 'right and inheritance', making his proof by judicial combat, or (if the tenant in occupation of the land chose) by that 'royal benefit granted to the people by the goodness of the king', a grand assize: the procedure according to which four knights chose twelve knights from the neighbourhood to swear to the descent of the land back to a remoter date of limitation (perhaps Henry I's reign, Stephen's being pointedly ignored). Legal actions could also start with writs ordering lords to receive homage and relief or tenants to perform their 'customs and services', though in course of time the element of service, even in the form of money-rents, fell away from the tenure ('holding') of a fee, leaving the tenant 'in fee simple' with unconditional ownership.<sup>101</sup>

*Government in Medieval England and Normandy*, ed. Garnett and Hudson, 222; id., 'Court cases and legal arguments in England, c. 1066–1166', *TRHS*, 6th ser. 10 (2000), which maintains that disputes about land tenure in England were conducted with less recourse to force and more use of legal norms, especially norms of reasonable procedure; see *RRAN* ii, appx. nos. xliii, li, cxxxiv, clxxx, ccxv, ccxxxvi, ccxxxviii, cclvi; and iii, nos. 40, 180, 312, 912, 999, for grants by Henry I and Henry II of land to be held as the grantee's ancestor held it, or as it was held at a date in the past.

<sup>99</sup> *English Lawsuits*, 310 (no. 359).

<sup>100</sup> *Ibid.* 351 (no. 393).

<sup>101</sup> *Glanvill*, 23, 150 ff., 180; *Early Registers of Writs*, 10 (writ 27), 230–1.

## PROPERTY AND LIBERTY

The land law did more than establish hierarchies of wealth. Along with the ownership of land, the *acta* of medieval kings conveyed varying extents of freedom. Whereas the property recoverable by writs of right or mort d'ancestor must have been held 'in demesne as of fee', the complainant in an assize of novel disseisin was required to say that the defendant had unjustly seised or damaged, since an appointed date of limitation, what he had possessed as a 'free tenement' (*liberum tenementum*).<sup>102</sup> By contrast the land of villeins was held at the will of their lords, who alone could sue for it in the king's courts—servile tenants had no access to them. In the thirteenth century, a successful suit for a person's lands in the courts of the king of England would consequently become the most effective way of asserting free status, and other tests like the level of services due to the landlord, or ability to 'go with one's lands where one chose' (already adduced by Domesday claimants to prove they were *liberi homines*), were used mainly to support or counter this proof of freedom.<sup>103</sup>

Being a 'freeholder' (a *liber tenens*) was the minimum qualification for free status, but a prelate or noble expected to receive more positive freedoms with his lands. *Libertas* and its derivatives (e.g. the 'liberality' [*liberalitas*] with which gifts were made, to be enjoyed *quiete et libere*, or 'more freely'—*liberius*—than by other beneficiaries) are ubiquitous expressions in medieval charters, and in the great majority of cases they refer to grants of territorial immunity, not of personal freedom.<sup>104</sup> From the beginning, *privilegia libertatis* were expected of Frankish and Anglo-Saxon kings by ecclesiastical landowners, and many twelfth-century royal *acta* merely confirmed these, the Emperor Frederick I deeming 'nothing more worthy or healthy than to restore the peace of holy churches, multiply their advantages and joyfully reform them to the state of their ancient liberty (*in antique sue libertatis statum . . . feliciter eas reformare*)'.<sup>105</sup> An essential element of early immunities was the exclusion of royal and episcopal agents, of 'any power of public law', from the immunists' lands, which may be seen as the loading on to landlords of the peace-keeping functions which kings did not then have the

<sup>102</sup> Ibid. 167 ff.

<sup>103</sup> *English Lawsuits*, 55 (no. 31); C. T. Flower, *Introduction to the Curia Regis Rolls, 1199–1230 A.D.*, Selden Soc. 62 (London, 1943), 222–34; Harding, *England in the Thirteenth Century*, 74–5.

<sup>104</sup> For what follows, see A. Harding, 'Political Liberty in the Middle Ages', *Speculum*, 55 (1980); K. Arnold, 'Freiheit im Mittelalter', *Historisches Jahrbuch*, 104 (1984).

<sup>105</sup> *Conradi I, Heinrici et Ottonis I Diplomata*, 92.15, 461.20, 589, 621; *Heinrici II et Arduini Diplomata*, no. 29; *Friderici I Diplomata*, 1158–67, 288.28, and cf. 164.25, 172.23, 263.28, 272.20, 291.43, 316.36, 320.22, 460.1 etc.

resources to fulfil. This 'liberty' was the inviolability of a prelate's or baron's *lands*, so that *libertas* could signify both the freedom of the immunist to exercise jurisdiction within his territory and the immune territory itself.<sup>106</sup> It is not clear which is the primary meaning when we read that in 855 the king of the Mercians 'wrote a liberty' for the church of Worcester *in* a number of 'territories and places' and two years later added 'a certain small portion of a liberty in the town of London', in which the bishop was to have scales and weights and measures to regulate trade 'as is customary in a port'; or find William the Conqueror founding the abbey and liberty of Battle, effectively creating a little diocese and hundred of its own.<sup>107</sup>

Grants of territorial liberty were in effect grants of public powers of government, which was surely why a lord who wanted to 'liberate' a church he had founded from 'all episcopal and secular obligations', as William of Bellême did some time in the third decade of the eleventh century, found it necessary to bring together the king of France and as many bishops and counts as he could muster at the consecration.<sup>108</sup> More usually it was the king himself who granted liberties. In a charter which he caused to be placed on the altar of the church of Saint-Pierre at Corbie in 1075, restoring to the abbey the power of *vicomte* or 'tribune' in Corbie of which it had been deprived by the count of Amiens, King Philip I found it necessary to say a little about 'the liberty of that place' and how it had grown by royal decree.<sup>109</sup>

The granting to great churches of 'liberties and free customs' (meaning chiefly the exercise of justice) was an adaptation of the Frankish immunity to a feudal age which transferred easily to England after the Conquest. The jurisdiction of the hundred court had often come into the hands of Anglo-Saxon lords as 'sake and soke', and King William must have had this in mind when, for instance, he told an abbot that he should hold a monastery's lands 'with the same law and liberty as any of his predecessors held it in King Edward's time or mine'.<sup>110</sup> The chronicler Florence of Worcester describes how in 1070–1 Bishop

<sup>106</sup> *Formulae*, 39–43; cf. *Friderici I Diplomata*, 1158–1167, 197.8 (*secundum antiquam et primitivam illius loci libertatem*); 315.40–316, 433.12.

<sup>107</sup> EHD i, nos. 83, 85, 87, 90, 92, 95, 120; Eleanor Searle, *Lordship and Community: Battle Abbey and its Banlieu, 1066–1538* (Toronto, 1974), 198–9.

<sup>108</sup> *Recueil des actes de Philippe Ier*, pp. ccxix–ccxxxv, 428–31; J. F. Lemarignier, *Le Gouvernement royal aux premiers temps capétiens 987–1108* (Paris, 1965), 89–90, n. 89.

<sup>109</sup> *Recueil des actes de Philippe Ier*, 239; cf. 65–6, 67, 110, 141, 145, 157, 179, 180, 182, 184, 198, 209–10, 225, 235, 259, 271, 295–6, 298–9, 305, 328, 339, 341, 399; *Recueil des actes de Louis VI, 1108–1137*, i. 19, 22, 39, 45, 465–6.

<sup>110</sup> J. Vendevre, 'La "Libertas" royale des communautés religieuses au XI<sup>e</sup> siècle', *Nouvelle Revue Historique*, 33 (1909); F. W. Maitland, *Domesday Book and Beyond* (Cambridge UP, 1897), 80–107; H. M. Cam, *Law-Finders and Law-Makers in Medieval England* (London, 1962), 26; RRAN i, 50–1, 60, 125 (xxiii), 127–8 (xxxiii).

Wulfstan of Worcester recovered the possessions of his church 'endowed with the same liberty with which its first founders [the kings of the Mercians and the tenth-century kings of England] made it free (*ipsam liberavit*)'.<sup>111</sup> The 'customs and liberties' which Archbishop Lanfranc claimed in 1072 before an assembly on Penenden Heath of men from the whole county of Kent, 'Frenchmen and especially Englishmen skilled in the ancient laws and customs', were 'sake, soke, toll, team, flymenfyrn, grithbreach, forestel, haimfare and infangthief', with all other customs equal or inferior to these, in lands and waters, in woods, roads, and meadows, and all things and all places within the city and without, within the borough and without'; in this trial, which is referred to more than once in Domesday book, Lanfranc had to establish his free customs not only against Bishop Odo of Bayeux, earl of Kent, but also against the Conqueror, for he claimed to hold his lands in the same way that the king held his—*liberas et quietas* and with 'the free customs due to him'.<sup>112</sup>

Amongst the many apparently spurious charters of Westminster Abbey there is one of Henry I confirming freedom from all episcopal and secular exactions to the place in which he has just been anointed king, and adding to 'this liberty . . . all laws and customs which pertain to me'.<sup>113</sup> That day in 1100 was certainly the occasion of the addressing of a general charter to all Henry's 'barons and faithful men, both French and English', which moved quickly from making the church 'free' by undertaking not to sell or lease its property or exploit the lands of bishoprics or abbeys during vacancies, to an abolition of 'all the evil customs by which the kingdom of England has been unjustly oppressed', which turn out to be such things as the charging of excessive reliefs from feudal heirs to succeed to their fathers' lands.<sup>114</sup> Soon after this laymen like the king's liegeman Hardulf and the king's butler William de Albini were being granted manors 'with sake and soke and all liberties and free customs', and Stephen's probable coronation charter of 1135 confirmed all the liberties, good laws, and customs which Henry I had granted (as Henry had purported to restore the law of Edward the Confessor), but now to all the king's barons and men, without special mention of churches.<sup>115</sup> The 'Laws of Henry I' had already borne the title: 'Henry's laws concerning the liberty of the church and all England', and stated that 'vavassors' holding *liberas terras* had the liberty of exercising justice in them, that the king's judges should be

<sup>111</sup> *English Lawsuits*, 4, 40–1.

<sup>112</sup> *Ibid.* 7–15.

<sup>113</sup> *RRAN* ii. 1–2, 305–6.

<sup>114</sup> *SR* i. 4; Stubbs, *Select Charters*, 158; *EHD* ii. 400–2.

<sup>115</sup> *RRAN* ii. 61 (no. 793), 85–6 (no. 911), 315 (xliii), 322 (lxiii); and iii, nos. 270, 271, 928.

barons holding free lands in the county (not villeins or base or poor persons), and that a person 'so advanced in personal freedom' that he could speak for himself in a law-suit must be informed of the day appointed for his case.<sup>116</sup> Magna Carta, though not extracted from John till sixteen years after his coronation, can be viewed as an enormously extended version of Henry I's original 'charter of liberties', beginning as it does with a confirmation that the church shall be free and have all its rights and liberties and continuing with a concession of 'all the following liberties' to the laity of the kingdom, this time not just to 'my barons and other tenants' as in Henry I's charter, nor to 'my barons and men' as in Stephen's and Henry II's, but to 'all free men of our realm . . . to be held by them and their heirs' in perpetuity.<sup>117</sup>

The ecclesiastical immunity had given to the sense of liberty the element of freedom from official interference within a defined territory. Now more generally lands were granted to be held *bene et in pace et libere et quiete et honorifice* and to some degree 'free and immune from exaction, custom and service'. 'Free' was a word most commonly used of tenure—in free alms, or in free barony with sake and soke, or in frankmarriage (that is exempt from all services for three generations after the grant to the conjugal pair).<sup>118</sup> 'Franchise' was originally a matter of tenure, but among the French-speaking aristocracy in England it naturally tended to displace *libertas* over its whole range of meanings, including the barons' jurisdictional powers. It was title to all franchises in this sense that Henry III and, more systematically, Edward I began to question, demanding that the royal charters which should have granted them be shown to his justices in eyre.<sup>119</sup> In 1329, Chief Justice Scrope would assert that the king sent out eyres precisely to see how the barons governed his people, since 'franchise is to have jurisdiction and rule over the people of the king' (*franchise est pur aver jurisdiction, et rule del people le roy*).<sup>120</sup> A franchise (or *libertas* in a cleric's Latin) was a bundle of powers attached to a person's land, and as such could be attributed to the king himself: in February 1259 the barons promised to observe

<sup>116</sup> *Leges Henrici Primi*, ed. Downer, 8, 128 (§27), 130 (§29), 184 (§59.8).

<sup>117</sup> EHD ii. 402, 407; Holt, *Magna Carta*, 132–3, 316–17.

<sup>118</sup> For the formulae of grants to hold 'freely', see (e.g.) Harmer, *Anglo-Saxon Writs*, 257 (no. 56), 260–1; RRAN ii. 312 (xxxii), 313 (xxxvii), 315 (xliii), 316 (xlvi), 369 (ccxxxviii), 374 (cclvi), 369 (ccxxxviii), and iii. 14 (no. 40) etc.; for a grant to a church in frankalmoign, *ibid.* 308 (xv); *Recueil des actes de Henri II*, Introduction, 152; for frankmarriage, Pollock and Maitland, *History of English Law*, ii. 15–17; for tenure 'in free barony', *Formulary E, Scottish Letters and Brieves, 1286–1424*, ed. A. A. M. Duncan (U. of Glasgow Scottish History Department, 1976), no. 41.

<sup>119</sup> SR i. 45; by the Statute of Gloucester of 1278, sheriffs were to summon before the king or his justices *tuz ceus, qi aucunes fraunchises cleiment aver, par les chartres les predecessurs le Rei*.

<sup>120</sup> G. D. G. Hall, 'The Frequency of General Eyres', *EHR* 74 (1959), 91.



towards their men 'the points of the charters of franchises' which they themselves had been granted by the king, and also to respect what pertained 'to the king and his franchises'.<sup>121</sup>

Liberties were first of all privileges and powers: in the thirteenth-century struggles of the barons with an ever more assertive monarchy, they became the foundations of an idea of political liberty. When Edward I demanded to know 'by what warrant' (*quo warranto*) franchises were enjoyed, the answer was sometimes 'by right of conquest' (i.e. in 1066), and the myth arose that Earl Warenne produced before the justices the rusty sword with which it had been done: to these men land and freedom were inseparable.<sup>122</sup> At the level of kingdoms, it is surely not a mere echo of the traditional land grant which one finds in the agreement of Andrew Harclay, earl of Carlisle, in 1323, that Robert Bruce and his heirs might hold the kingdom of Scotland 'franchement, entierement, e quitement': the franchise of the land charters may indeed have been one of the elements out of which the Scots forged a new concept of national freedom.<sup>123</sup>

With the development of the king's courts, the extent of the territorial liberties of churches like Westminster and Battle, of the powers of marcher lords like Richard de Clare in his 'parliament' of Glamorgan, and of the detailed jurisdictions of middling lords, all fell to be decided in the king's courts in the thirteenth century.<sup>124</sup> Since disputes about franchises originated as often as not in conflicting grants, the terms of ancient charters could not settle them: a law of liberties based on the general interest of crown and community was needed. The exercise of baronial franchises was carefully scrutinized to see that royal 'freedoms' were not infringed. A prior who exacted tolls from the king's officers when they went to his market to buy eggs was told that his liberty had not been granted to be used to the damage of the liberty of the king and

<sup>121</sup> *Documents of the Baronial Movement of Reform and Rebellion*, 132-5; see D. A. Carpenter, 'The Second Century of English Feudalism', *Past and Present*, 168 (2000), for the continuing strength of feudal lordship in thirteenth-century England.

<sup>122</sup> D. W. Sutherland, *Quo Warranto Proceedings in the Reign of Edward I* (Oxford: Clarendon Press, 1963), 25-7, 82 n., 183-4; H. M. Cam, *Liberties and Communities in Medieval England* (London, 1963), 176, is surely wrong to charge the chronicler with 'misrepresenting the character of the Quo Warranto proceedings' by this story, which effectively brings out the territorial basis of franchise.

<sup>123</sup> *Anglo-Scottish Relations, 1174-1328*, ed. E. L. G. Stones (Oxford: Clarendon Press, 1971), 310; cf. *Vita Edwardi Secundi*, 132, for the report that in 1324 the Scots were demanding that Scotland should be 'immune' from all exactions of the realm of England, and that by right of conquest the whole territory they had marched through to the gates of York should be 'free' to them.

<sup>124</sup> J. B. Smith, 'The Lordship of Glamorgan', *Morganwg*, 2 (1958), 32-3; *Bracton's Notebook*, ed. F. W. Maitland, 3 vols. (London, 1887), nos. 1050, 1107, 1154, 1250, 1598, 1676, 1716, 1720; *Curia Regis Rolls*, iii. 98, 131, 241; v. 12, 35; vii. 82; xi. 81-2, 90 (no. 473), 131 (no. 666), 218 (no. 1076), 325 (no. 1625), 445 (no. 2279); xv. 243 (no. 1074), 273 (no. 1137), 316-17 (no. 1277), 319-20 (no. 1285).

his heirs.<sup>125</sup> Another prior had his liberty seized because his hanging of the corpse of a cattle thief who had stabbed himself on capture was against the common law: the man had been neither convicted nor outlawed.<sup>126</sup> Infringements of liberties bulk large in the subject-matter of the new thirteenth-century writs of trespass. The earliest in a register of writs (of c.1272) include one summoning the mayor and bailiffs of Newcastle to show why they exacted tolls from the prior of Tynemouth *contra libertates suas*.<sup>127</sup> The Register of Writs as printed in the sixteenth century contains examples alleging infringements of the abbot of Westminster's rights, conferred 'by the charters of our progenitors as kings of England and our own confirmation', to the chattels of felons and fugitives; of a prior's chartered right to tolls; of a baron's liberty of return of writs (i.e. to receive and execute royal writs in his lands); and of the archbishop of York's liberty of licensing men to exercise the office or mystery of dyer in the town of Ripon.<sup>128</sup>

The effect of legal actions and legislation was to begin to shift the meaning of liberties from the powers of the prelates and barons to the rights of individual subjects, such as the freedom from tolls for the men of the prior of Tynemouth or the merchants of a privileged town. A grant of territorial liberty to a church or lay baron had always implied individual freedoms for the men of the lordship, who should be seen as the original type of privileged community. In the law-suit on Penenden Heath, Archbishop Lanfranc was said to have 'liberated his men from the evil customs which Odo [of Bayeux] sought to impose on them'.<sup>129</sup>

From Merovingian times, abbeys played a central role in trade and obtained freedom from the payment of tolls for servants travelling on their business, and Carolingian grants of immunity were regularly accompanied by special protections for the beneficiaries' lands and goods—and their men, wherever they went.<sup>130</sup> Protections for merchants, giving them 'all and singular . . . free power to buy and sell according to the laws and customs of the kingdom' (*liberam potestatem*

<sup>125</sup> *Select Cases in the Court of King's Bench*, ed. Sayles, ii, pp. lvi–lviii; RP i. 41 (no. 39); *Rotuli parliamentorum Anglie hactenus inediti*, ed. H. G. Richardson and G. O. Sayles, Camden Soc. 3rd ser. 51 (London, 1935), 31–44; *Memoranda de Parlamento*, ed. F. W. Maitland (London: Rolls Series, 1893), no. 388.

<sup>126</sup> *Curia Regis Rolls*, xv, no. 1146 (pp. 276–7); cf. *Select Cases of Procedure without Writ*, 66–7.

<sup>127</sup> S. F. C. Milsom, 'Trespass from Henry III to Edward III', *Law Quarterly Review*, 74 (1958), 417–18, 425; G. D. G. Hall, 'Some Early Writs of "Trespass"', *Law Quarterly Review*, 73 (1957), 72–3.

<sup>128</sup> *Registrum Omnium Brevium*, fos. 103–103b, 107, 105b–106.

<sup>129</sup> Niermeyer, *lexicon minus*; Latham, *Word-List*; Holt, *Magna Carta*, 94–100, 125–9; *Recueil des actes de Philippe Ier*, no. 390; *Recueil des actes de Philippe Auguste*, nos. 1, 5, 10, 15, 16, 17, 19 etc.; Maitland, *Domesday Book and Beyond*, 76–9; Harmer, *Anglo-Saxon Writs*, 451; EHD ii. 603–4; *English Lawsuits*, i. 12.

<sup>130</sup> M. Kroell, *L'Immunité franque* (Paris, 1910), 127.

*emendi et vendendi secundum leges et consuetudines regni*), remained the most familiar of grants throughout the Middle Ages.<sup>131</sup> By substituting free burgage tenure for the villein services and merchet of the rural manor, English lords created trading boroughs.<sup>132</sup> Villagers all over twelfth-century France clubbed together to obtain costly charters of freedom. The much-copied *Carta Franchesis* of Lorris near Orleans, granted by its lord (who happened also to be King Louis VII) in 1155, began by setting fixed rents for the holdings of the inhabitants of the parish of Lorris and exempting them from tolls and tallages and corvées. The 'liberties and free customs' of an increasingly active sort granted to boroughs were obtained as communal privileges, but could mostly be enjoyed only as individual rights, like the right not to be sued in any but the municipal court, and freedom from 'tolls, passage-dues, and other customs', which might have to be invoked by lone burgesses far from the borough itself. Economic forces multiplied grants of liberties of this sort, and the king's courts safeguarded them.<sup>133</sup>

The freemen of privileged towns were among the first free citizens, but other types of community received grants of liberties in England in the years leading up to Magna Carta. Significant for individual liberty was the type of grant the men of the county of Devon obtained in 1204, empowering the shire court 'to give bail for men arrested by the sheriff, so that none should remain in prison because of his malice'. In 1207-9 Peter Bruce granted a charter of liberties to the knights and free tenants of Cleveland regarding the conduct of pleas in a wapentake he had just purchased.<sup>134</sup> Liberties were granted by the king to the barons in 1215 and 1258-9 on the understanding that they would be passed on to their men.<sup>135</sup> The 'whole commons of the Franchise of Tyndale' as well as the community of the borough of Reading sued for freedom from tolls and from being taken to court outside their liberties.<sup>136</sup> Restrictions on the

<sup>131</sup> *Recueil des actes de Charles le Chauve*, iii. 227; RRAN i, appx. 42, 66, 81; *Recueil des actes de Henri II*, i. 26-7; A. Harding, 'The Medieval Brieves of Protection', *Juridical Review* (1966), 116, 117, 138 (the last example is from 1535); *Registrum Brevium*, fos. 24b-25; *Formulary E*, ed. Duncan, nos. 54, 61.

<sup>132</sup> *British Borough Charters, 1042-1216*, ed. A. Ballard (Cambridge UP, 1913), pp. xl, 40-1.

<sup>133</sup> *Recueil des actes de Philippe Auguste*, i. 4-5, 30-2 etc.; M. Prou, *Les Coutumes de Lorris et leur propagation aux XII<sup>e</sup> et XIII<sup>e</sup> siècles* (Paris, 1884), 445-57; G. Duby, *Rural Economy and Country Life in the Medieval West*, tr. C. Postan (London, 1968), 242-3; *English Lawsuits*, 662-3, 698, for the liberties the townsmen of Bury St. Edmunds extracted from the abbey.

<sup>134</sup> Holt, *Magna Carta*, 60-72.

<sup>135</sup> *Ibid.* 469 (c. 60); *Documents of the Baronial Movement*, 133; cf. A. Artonne, *Le mouvement de 1314 et les chartes provinciales de 1315* (Paris, 1912), 166-8; A. J. Otway-Ruthven, 'The Constitutional Position of the Great Lordships of South Wales', *TRHS*, 5th ser. 8 (1958), 15; R. R. Davies, *Lordship and Society in the March of Wales, 1282-1400* (Oxford: Clarendon Press, 1978), 88, 94, 102, and ch. 10.

<sup>136</sup> C. M. Fraser, *Ancient Petitions relating to Northumberland*, Surtees Soc. 176 (Durham,

number and activities of serjeants of the peace, seignorial peace-officers peculiar to the western and northern counties of England who were maintained at the cost of the inhabitants, was a common concession wrung from magnates.<sup>137</sup> The lords or bailiffs of boroughs, the attorney of the chancellor and masters of the university of Oxford, or the warden of the stannary, might claim a franchise when individuals from their liberties were brought into foreign courts, but often it was an individual 'of the liberty' who objected that he was not bound to answer.<sup>138</sup>

A claim to the 'franchise' of having a private gallows to hang thieves on one's land might go to a grand assize,<sup>139</sup> but the lords' growing use of actions of trespass *contra libertates suas* (not 'real' but 'personal' actions) against those who impeded or took tolls from merchants coming to their markets emphasizes that liberties were now being attached to people rather than to land.<sup>140</sup> The prior of Tynemouth objected to being made to answer in the Westminster parliament of 1290 for the creation of a port at North Shields by a writ which did not mention his free tenement and the liberty attached to it, but it was decided that the prior's acts constituted injuries to the king and his burgesses of Newcastle, this ancient dispute turning on personal liberties, not property rights.<sup>141</sup> Nevertheless, Chief Justice Holt stated in 1704 that the 'noble Franchise and Right' of voting in an election of parliamentary burgesses, which entitled 'the subject in a Share of the Government and Legislature' was a 'real Right, annexed to the Tenure in Burgage'. The origin of political liberty in property-holding was still understood.<sup>142</sup>

The growth of personal, largely bourgeois, freedom appears in the proceedings of French *parlements*. In the court of Alphonse of Poitiers the burgesses of Millau and the syndics of a corporation (*universitas*) of knights and goodmen as well as individuals are found complaining of bailiffs who infringe their *franquesia seu libertas* of free passage by land

1966), 128; RP i. 20-1; *Early Registers of Writs*, 13 (37a), 201-2; Milsom, 'Trespass', 422-5; *Curia Regis Rolls*, xi. 415-16 (no. 2055); xv. 214-15 (no. 1005); *Bracton's Notebook*, nos. 16, 145, 1720; *Select Cases in the Exchequer of Pleas*, ed. H. Jenkinson and B. Fermoy, Selden Soc. 48 (London, 1932), nos. 76, 114b.

<sup>137</sup> R. Stewart-Brown, *The Serjeants of the Peace in Medieval England and Wales* (Manchester, 1936), appx. 3, esp. no. 9.

<sup>138</sup> *Curia Regis Rolls*, xv. 119 (no. 565); *Select Cases of Procedure without Writ*, 36, 41, 81, 94, 116; *Select Cases in the Court of King's Bench*, i. 169-72, ii. 35-6, iii. 156-7, 159 etc.

<sup>139</sup> *Curia Regis Rolls*, iv. 318.

<sup>140</sup> Milsom, 'Trespass', 422-4.

<sup>141</sup> RP, i. 26-9.

<sup>142</sup> *Holt's Reports*, quoted in *The Law and Working of the Constitution*, i. 1660-1783, ed. W. C. Costin and J. S. Watson (London, 1952), 278.

and water.<sup>143</sup> The French cases bring into focus another important way by which thirteenth-century monarchies changed territorial liberties into individual rights: that is, by the extinction of the lordships through which the liberties had flowed. With the removal of the intermediate lords whose ancestors had received the charters of liberties and bestowed franchise on their tenants, freedom ceased to be derived from a multitude of separate land grants and was seen as the sum of the customary rights of people subject to the king alone. King John forfeited Normandy to the French crown. In Louis IX's great inquiry into administrative abuses forty-three years later, Norman after Norman claimed customs they had lost when their lords had chosen English allegiance and forfeited their Norman lands. Thus, the burgesses of Verneuil complained of the imposition of hearth-money, despite King Philip's confirmation of all the liberties and customs which they had possessed in Normandy when the kings of England were their lords.<sup>144</sup>

Languedoc had meanwhile fallen to a mixture of force and the diplomacy which arranged the marriage of Louis IX's brother Alphonse to the heiress of Count Raymond VII of Toulouse. Petitioners to Alphonse's court asserted franchises granted by Raymond while he lived or complained of new customs imposed by him to the prejudice of their liberties; these people Count Alphonse often took the responsibility for restoring to their good and approved customs and liberties—in order, the grants said, to free Count Raymond's soul. As the lordships within which they had grown disappeared, customs became the possession of the communities of tenants, almost part of the soil they tilled. This was 'ancient custom'; 'right and custom long approved'; 'the use of the land and the custom of its courts'; *consuetudines patrie juste et rationabiles, manifeste vel notorie*.<sup>145</sup> Yet it seemed to Alphonse's council, considering a petition of the barons of Agen that justice should be done there according to the custom of Agen and not the *jus scriptum* of civil and canon law, that customs could often be doubtful and uncertain.<sup>146</sup> They needed to be written down, and in the course of the thirteenth century they were written down, in the *coutumiers* of Normandy first of all and

<sup>143</sup> *Enquêtes administratives d'Alfonse de Poitiers*, ed. Fournier and Guebin, 33, 63, 130, 137, 214, 216, 299–300, 304, 312, 325.

<sup>144</sup> *Enquêtes administratives du règne de Saint Louis*, ed. Delisle in *Recueil des historiens des Gaules et de la France*, xxiv (Paris, 1904), 1–73 (nos. 49, 76, 92, 95, 124, 157, 163, 207, 219, 239, 253, 266, 274, 275, 317, 355, 384, 395); *Les Olim*, i. 62 (7), 77, 213.

<sup>145</sup> *Enquêtes administratives d'Alfonse de Poitiers*, 63 (no. 5), 70 (no. 90), 99 (nos. 29, 30), 115 (no. 58), 137 (no. 12), 139 (no. 22), 214 (no. 4), 304.

<sup>146</sup> *Ibid.* 349 (nos. 493, 494, 497).

then those of Vermandois, Orléannais, Touraine, Anjou, and the Beauvaisis.<sup>147</sup> In the latter half of the century, the nobility appeared in the new role of champions before the king of these provincial customs. In 1315, leagues of nobles in the various provinces of France extracted charters from Louis X confirming their own privileges in respect of jurisdiction (including the right to have prisons) and personal justice (they were not to be imprisoned on mere suspicion or condemned on confessions made under torture). But in Normandy, Amiens, and Vermandois, in particular, 'all the common people' were included in the grants, and the king's 'loyal subjects' generally were confirmed in the 'good usages' and 'ancient customs' or 'general custom' of their *pays*, such as they had been governed by in the time of 'Monseigneur Saint Loys'.<sup>148</sup>

In England, too, liberty and custom were being detached from, even opposed to lordship. The Hundred Rolls inquest of 1274–5 investigated 'liberties which obstruct common justice'.<sup>149</sup> The potential was recognized for a noble franchise to conflict with 'the custom of England'. Lords were bound to do justice according to the customs of their manors, and the men of a town or a private hundred might complain to the king or parliament against the imposition of new customs. Once again, the extinction of lordships was the strongest impulse to the recognition of franchises as customary rights inhering in the communities of tenants. The wars which began with Edward I's invasion of Scotland in 1296 forced some lords to choose between their English and Scottish lands, just as others had been forced early in the century to choose between English and Norman lands. The Scottish kings' liberty of Tynedale and the Balliol family possessions in England were confiscated. Tynedale saw six different lords come and go in the next forty years, and in such circumstances it was 'the commons of the Franchise of Tynedale . . . on the point of being destroyed for lack of right' who had to take thought for the execution of jurisdiction in the lordship.<sup>150</sup>

For a time, the lordship of the king of Scots was in abeyance in his own land, and Edward I adjudicated on the liberties and customs of the Scots. At his spring parliament of 1305, 136 petitions from Scotland were submitted. In reply, great abbeys like Melrose and Sweetheart were told to show the charters of feoffment and liberty they wanted

<sup>147</sup> J. H. Shennan, *The Parlement of Paris* (London, 1968), 51.

<sup>148</sup> Artonne, *Le Mouvement de 1314 et les chartes provinciales de 1315, 165, 167, 169, 173–6, 179, 181, 182, 184* (articles 1 and 18 of Berri).

<sup>149</sup> *EHD* iii. 393 (c. 10).

<sup>150</sup> *Curia Regis Rolls*, xv. 52–3 (no. 235), 194 (no. 908), 251 (no. 1098); *RP* i. 4 (no. 14); *Ancient Petitions relating to Northumberland*, 109, 127–8; J. A. Tuck, 'Northumbrian Society in the Fourteenth Century', *Northern History*, 3 (1968).

confirmed, and as to the protections they sought were informed that the king 'took all religious men under his protection' automatically. Where there was no possibility of prejudice to his own rights, the king conceded to the Scots 'the customs used in those parts'.<sup>151</sup> The English burgesses of Roxburgh did not get the confirmation of the charters granted them by Scottish kings they asked for; but a remedy was ordered for the burgesses of Scotland as a whole, when they begged to be preserved in the liberties and laws which they had used in the time of King David, in particular freedom from tallages and customs at Roxburgh and Berwick.<sup>152</sup> In the case of Wales there was the same appeal to the king for the confirmation of the usages which had been enjoyed under and by the grant of the Welsh princes before the conquest of 1282-3. Even a group of bondmen are found petitioning for the restoration of a mill, for 'in all Wales there have been no people of so free a condition as they were in the time of the Princes and all say thus'. It was held that the bishop of Bangor and his free tenants could not have been granted the monopoly of buying and selling cows, horses, and other goods anywhere within the episcopal domains, since such freedoms were historically 'common right' in Gwynedd. Certain freedoms of every man were being derived from reason and history, and explicitly opposed to the privileged liberty granted to a few.<sup>153</sup> Wilful lordship (*volountrif seigneurie*) such as it was alleged that Hugh Despenser exercised in Glamorgan was now condemned as the destroyer of the rights, laws, and customs of a community 'used from all time in antiquity'.<sup>154</sup>

#### ESTATES OF PEOPLE

The legislation of increasingly assertive monarchies converted the chartered freedoms of lordships and communes into the more passive rights of classes of individuals. In medieval usage *status* meant the standing of an individual within the commonwealth as often as it did the condition of the commonwealth as a whole, which came to be seen as structured by 'estates' of persons with the king as the head—what the Germans have called a *Standestaat*.<sup>155</sup>

The proper ordering of society and the distinctive roles and rights of

<sup>151</sup> *Memoranda de Parlamento*, ed. Maitland, nos. 276, 280, 282, 283, 285, 303, 307, 346, 373, 384, 390, 391, 394, 400.

<sup>152</sup> *Ibid.* nos. 319, 333, 383.  
<sup>153</sup> *Calendar of Ancient Petitions relating to Wales*, ed. W. Rees (Cardiff, 1975), 28 (no. 187), 82-3, 99 (no. 3719), 114-15, 241 (no. 7145), 261 (no. 7785), 279 (no. 8242), 282-5, 339-40, 452; G. A. Usher, 'English Administration in Wales as seen in the Black Prince's *Quo Warranto* of 1348', *Welsh History Review*, 7 (1974-5).

<sup>154</sup> *Calendar of Ancient Petitions relating to Wales*, 279 (no. 8242).

<sup>155</sup> On the concept of the *Standestaat*, see G. Poggi, *The Development of the Modern State: A Sociological Introduction* (London, 1978), ch. 3, esp. p. 43.

'the three orders', the clergy, the warriors, and the workers, appears as a widespread concern in the eleventh century. The feudal constitutions of the Emperor Conrad and his successors distinguished between *capitanei* and *valvassores* (military vassals with the right to be tried by their peers), and below them citizens and 'rustics'.<sup>156</sup> In the twelfth century the Emperor Frederick I proclaimed it a ruler's duty to care for the *status singulorum* as well as for the state of the commonwealth, particularly for the well-being of churchmen 'of whatever dignity, state, degree, order or condition'.<sup>157</sup> The *Sachsenspiegel* attempted to fit society into seven orders, corresponding to the seven ages of the world and the seven canonical degrees of relationship: these were the king, the bishops and heads of religious houses, lay princes, free land-holders, a class of 'jurymen', and servants and dependents, with the vassals of prelates inserted rather artificially to make a seventh grade.<sup>158</sup> Apart from a new emphasis that all members of society, of *was stat wirdikeit oder wesen* they might be, must join in keeping the peace, the only change in the late medieval scheme of German society was the addition of the towns (*Stette*) after the nobles (but sometimes before the knights) in the addresses of the vernacular *Landfrieden*. Everywhere the chief among the stimuli to classification was the growing economic and political importance of the bourgeoisie, who needed to be given a place in society in relation to nobles and churchmen.<sup>159</sup>

The burst of royal legislation in thirteenth-century France and England 'to reform the state of the kingdom for the better' was primarily concerned with the rights and obligations of classes of individual, who in the words of the *Livre de Jostice* were all, 'castellan, vavassor, citizen, villein', under the hand of the king.<sup>160</sup> Strangely, it was the Jews, marked by disabilities rather than rights, who were the first group to be defined by the French kings' *stabilimenta*. A ruler had to balance the value of Jewish money-lending, and of the money he and his lords could extort for protecting the Jews, against the Church's condemnation of usury, and against the popular hatred, sometimes encouraged by the Jews' debtors, of these 'murderers of Our Saviour'. At the beginning of their reigns Philip Augustus, Louis VIII, and

<sup>156</sup> G. Duby, *The Three Orders: Feudal Society Imagined*, tr. A. Goldhammer (Chicago UP, 1980); Menat, *Campagnes lombardes au moyen âge*, 586; P. Wormald, *The Making of English Law: King Alfred to the Twelfth Century*, 1 (Oxford: Blackwell, 1999), 459.

<sup>157</sup> *Friderici I Diplomata*, 1158–1167, 193.23, 218.20, 263.28, 288.28, 315.40 etc.; 1168–1180, pp. 92–3; *Constitutiones*, 1298–1313, pp. 33 (no. 37); 1325–30, pp. 170 (no. 262), 258.15, 314.40 (the royal 'state'); 1350–3, 15.11, 17.10, 21.8, 26.41, 27.26, 56.11, 573; cf. *ibid.* 55.30, for a papal order to absolve an excommunicate as the restoration of his state.

<sup>158</sup> *Sachsenspiegel Landrecht*, ed. Eckhardt, 72 (I, 3); cf. above, pp. 96, 115–16.

<sup>159</sup> *Constitutiones*, 1298–1313, 371; cf. above, p. 89.

<sup>160</sup> Q. Griffiths, 'New men among the Lay Counselors of Saint Louis', *Medieval Studies*, 32, p. 258.



Louis IX all asserted their rulership by measures against this despised and vulnerable minority. In 1180–2 Philip first arrested and ransomed all the Jews within the royal demesne, then expelled them and seized their goods, then in 1198 readmitted them again from the neighbouring territories where they had sought refuge. At his accession in 1223 Louis VIII promulgated a law which attempted to damp down Jewish usury, but more significantly announced the agreement of king and barons *de statu Judaeorum* that no lord might receive or retain the Jews belonging to another (so appropriating their economic value).<sup>161</sup>

Louis IX's early edict concerning the Jews could be no more than a pious aspiration in its total banning of usury, but it effectively transferred the protection of the rights of lords over 'their' Jews from specific 'non-retention agreements' to a general law enforced by the king's courts. Saint Louis and his successors continued to increase Jewish disabilities, ordering the wearing of a badge to distinguish them from Christians and the burning of the Talmud and other 'blasphemous books'.<sup>162</sup> In England, as he embarked in 1275 upon a programme of law-making for 'the state of the realm and the state of holy church', Edward I issued 'the Statutes of Jewry', which followed Saint Louis's ordinances by requiring the Jews to wear the yellow badge and to live by honest labour, without the usury which the king had seen 'disheriting the good men of his land'.<sup>163</sup> Yet Edward was obliged to acknowledge that he and his ancestors had 'received much benefit from the Jewish people in all time past'. (There had indeed been a separate exchequer and separate justices of the Jews since the end of the twelfth century to exploit their wealth, and the growth of an English land-market had depended largely on their money-lending.) Jews might still acquire property, at least in towns, provided that they held it in chief of the king, who would protect them—and tax them—as his bondmen; they should be impleaded only in the king's court. Yet their reduction to the status of serfs of the king meant that their wholesale dispossession and expulsion became inevitable when nothing more was to be made from their exploitation. This administrative feat, begun in England and Gascony in 1290 and followed in due course by Philip IV, was a demonstration of the new power of the English and French monarchies over their peoples.<sup>164</sup>

<sup>161</sup> G. Langmuir, '“Judei Nostri” and the beginning of Capetian Legislation', *Traditio*, 16 (1960); W. C. Jordan, *The French Monarchy and the Jews: From Philip Augustus to the Last Capetians* (Philadelphia: U. of Pennsylvania, 1989); *Ordonnances des Roys de France*, i. 47–8.

<sup>162</sup> *Ordonnances des Roys de France*, i. 53–5, 75 (c. 32), 85, 216 (c. 129); Beaumanoir, *Coutumes de Beauvaisis*, i. 284–5 (§585), ii. 121 (§1206); *Les Olim*, i. 122 (xiii), 364 (vi), 791 (iv), 793 (vii), 807 (xxiii), 821–2 (xvi), 893 (xxxvi), 944 (xlv), iii. 749 (xxxii), 839 (xx).

<sup>163</sup> SR i. 221–3; EHD iii. 411–12.

<sup>164</sup> H. G. Richardson, *The English Jewry under Angevin Kings* (London, 1960); P. Brand, 'Jews and the Law in England, 1275–1290', *EHR* 115 (2000); *Select Cases in the Court of*

Though Christian serfs were too scattered to be a self-conscious 'commonalty', as the Jews were,<sup>165</sup> their working of the land was so basic to the feudal economy that definition of their status in relation to their landlords bulked large in custom and could not in the end be ignored by legislators. Serfs (bondmen, villeins) were *nativi*, 'born' into their servile status, but legal complications arose from marriages and occupational mobility across the divide between free and unfree peasants. Beaumanoir explained in the 1280s that where one parent was free and the other bond, children followed the mother's status. The status of a knight or gentleman was inherited from his father: but a knight could no more make free his children by a serf than a gentle mother could confer gentility on her children by a servile husband. A peasant could claim freedom on the grounds that his mother had lived 'en estat de franchise', or else that his lord had enfranchised him, or that he had been 'en estat de clergie' for at least ten years or been made free by residence in a town for a year and a day.<sup>166</sup>

Fifty years before Beaumanoir, Bracton set the villein's status under English law firmly within the realities of the land-holding system. The villein was not like a domestic slave. He was a serf because he was part of his landlord's agricultural equipment, and he needed a tenement himself to live from while he worked the lord's demesne. In fact some lords rented out all their demesne to their peasants, and the more enterprising farmers amongst the villeins took up tenements outside their lord's *potestates*—thus becoming, in Bracton's terms, *statuliberi*, free to the rest of the world.<sup>167</sup> A villein was denied an action for disseisin only against his manorial lord, because he had an absolute right to take back land that was his; a peasant's failure in a suit against his lord would be taken as proof of his bondage. On the other hand, the landlord had to go to the king's court to prove the bondage of an absconding villein and recover him.<sup>168</sup> Villeins had public rights. According to Magna Carta courts were to fine people according to their offences, and not so heavily that a freeman had to give up his tenement, a merchant the stock which provided his livelihood, or the villein his cart. Villeins might serve on juries when freemen were lacking.<sup>169</sup>

The servitude which villeins sought to escape was an economic servitude, which was degrading enough in its requirement of open-ended

*King's Bench*, i, pp. cxx (n. 2), clvi–clvii, clxi; ii., 30–4; iii, cxiii–cxiv; J. R. Strayer, *The Reign of Philip the Fair* (Princeton UP, 1980), 83, 148, 150, 162–3, 287.

<sup>165</sup> *Select Cases in the Court of King's Bench*, iii, p. cxiv.

<sup>166</sup> Beaumanoir, *Coutumes de Beauvaisis*, ii. 222–34; *Les Olim*, iii. 180 (lxiii), 793 (lxxviii).

<sup>167</sup> *Bracton on the Laws and Customs of England*, tr. Thorne, ii. 30–8, iii. 99–113.

<sup>168</sup> Harding, *England in the Thirteenth Century*, 74–6.

<sup>169</sup> Holt, *Magna Carta*, 457 (c. 20).

labour services (it was the arbitrariness of the demands which distinguished a villein from a free peasant, who might owe heavy but fixed work), and of a payment to the lord (called in England *merchet*) when a villein woman married and took her breeding-power outside the manor. Villein status was eventually destroyed by changing agrarian conditions rather than by royal legislation, which was invoked mainly in an attempt to preserve the landlords' rights over the *innobiles* and 'rustics' in a worsening economy.<sup>170</sup> In France the landlords, the king at their head, seem to have been more ready than in England to grant rights to villeins. Philip IV extended the practice of enfranchisement to entire administrative districts, and in 1315 Philip's son Louis X offered enfranchisement to the serfs on his demesne with a high-sounding condemnation of the ancient customs which had reduced to servitude so many of the common people in his so-called 'Royaume des Francs': surely all men were born free (*franc*) by natural right.<sup>171</sup> The declaration that serfdom was an unfortunate product of human history, since (in Beaumanoir's words) 'everyone of us is descended from one father and one mother' and 'the many estates of people' were 'once of the same freedom', was a commonplace of the law-books.<sup>172</sup> But the freeing of serfs was rarely an act of charity: Louis X's serfs were to pay him compensation individually for the loss of their services, the king needing their money to help finance a military campaign against the Flemings. Royal ordinances followed Beaumanoir in requiring a landlord to get his lord's permission to enfranchise serfs, for it diminished the value of his fief.<sup>173</sup>

In England escheators had standing instructions to investigate the losses to the king from his tenants-in-chiefs' enfranchisements of serfs.<sup>174</sup> But the king's own villeins gained from their landlord special privileges short of enfranchisement in respect of the security and inheritance of their tenancies and the definition of their services. These privileges the villeins of any lord who had acquired once royal land sought to assert as indelible rights, invoking the evidence of Domesday Book that they indeed lived on 'ancient demesne of the king'. The use of 'exemplifications made out of the book of Domesday' reached new levels in the third quarter of the fourteenth century, as lords attempted to confine the extra bargaining power and effective freedom conferred

<sup>170</sup> SR i. 227-8.

<sup>171</sup> *Les Olim*, iii. 957 (xxii); Beaumanoir, *Coutumes de Beauvaisis*, i. 490-4, ii. 230-7; Marc Bloch, *Rois et Serfs* (Paris, 1920); F. J. Pegues, *The Lawyers of the Last Capetians* (Princeton UP, 1962), 75, 116, 165-71, 185-6.

<sup>172</sup> Beaumanoir, *Coutumes de Beauvaisis*, ii. 235 (§1453); *Sachsenspiegel Landrecht*, 223, 230-2; *Bracton on the Laws and Customs of England*, ii. 30.

<sup>173</sup> *Ordonnances des Roys de France*, i. 188 (g), 278-81, 575, 583, 653.

<sup>174</sup> SR i. 239, 323.

by the Black Death on the peasants who survived.<sup>175</sup> In 1377 Richard II was compelled by the gentry to legislate against villeins who affirmed themselves 'to be quite and utterly discharged of all manner of servitude, due as much from their bodies as from their tenures'. The justices of the peace were issued with special commissions to punish all such rebels, and told to fine their maintainers and abettors also, 'as their estates [i.e. status] and the extent of their evil-doing demands'.<sup>176</sup>

The Commons in parliament were afraid of the destruction of the *estat* of landlords in England by 'the same peril that had come upon France by the rebellion and alliance of villeins against their lords'.<sup>177</sup> The *Jacquerie* of 1358 and the so-called 'Peasants' Revolt' which finally erupted in England in 1381 were seen as especially dangerous because of their 'maintainers and abettors' among the burgesses. Movement to a town was a villein's route to freedom, and French legislation was early concerned to control entry to the estate of burgess and define its rights and obligations. Beaumanoir describes a custom that no burgess might engage in private war like a gentleman, and records an ordinance made 'for the profit of the gentry throughout the realm' (i.e. one of the new 'général établissements' that were not just for the royal demesne), which forbade any lord but the king to grant a burgess a fief.<sup>178</sup> In *parlement* at Whitsun 1287 Philip IV issued a detailed ordinance on the way *bourgeoisies* should be created and held in his kingdom, so as to avoid, he said, the frauds by which his subjects were sorely aggrieved. Someone aspiring to be a *bourgeois* must go to the *prévôt* of the town, or the mayor where he had the necessary authority, and give security that, within a year and a day, he would buy premises in the town worth at least sixty *sous*. The provost or mayor must then certify the fact to the lord of the aspiring *bourgeois*, who would not enjoy a burgess's legal protection till it was done. The lord's chartered privileges, his right to pursue his serf and recover him from *bourgeoisie* and his continued jurisdiction over the new burgess's inherited property, were to be safeguarded.<sup>179</sup>

Of course the real anxiety concerned not the merchants and registered burgesses but the crowds of artisans who moved less controllably between town and country. In 1378 the Commons in the English

<sup>175</sup> Harding, *England in the Thirteenth Century*, 77–8; R. Faith, 'The "Great Rumour" of 1377 and Peasant Ideology', in *The English Rising of 1381*, ed. R. H. Hilton and T. H. Aston (Cambridge UP, 1984); R. H. Britnell, 'Feudal Reaction after the Black Death in the Palatinate of Durham', *Past and Present*, 128 (1990).

<sup>176</sup> SR ii. 2–3.

<sup>177</sup> RP iii. 21b (no. 47).

<sup>178</sup> R. Cazelles, 'The Jacquerie', and A. F. Butcher, 'English Urban Society and the Revolt of 1381', in *The English Rising of 1381*; Beaumanoir, *Coutumes de Beauvaisis*, ii. 257 (§ 1499), 356–7 (§ 1671–2).

<sup>179</sup> *Ordonnances des Roys de France*, i. 314.

parliament petitioned for a remedy against the labourers who refused to work and migrated to the towns to become artisans, mariners, or clerks, so that the very cultivation of the land was threatened.<sup>180</sup> Beaumanoir had warned in the previous century about the peril of communal alliances like those of the Lombard cities against the Hohenstaufen emperors, but also of 'another sort of people' who swore, and coerced reluctant companions to swear, not to work for such low wages as before: agreements that must be severely punished as soon as they came to the knowledge of the sovereign or a lesser lord, for they made essential goods dearer, and were 'against the common profit'.<sup>181</sup> But the stream of labour legislation which governments began to produce in the fourteenth century had a wider scope than the restraint of the wage-inflation among the peasantry let loose by the Black Death. The Ordinance of Labourers promulgated in England in 1349 and the Statute of 1351 attempted to fix the wages of carpenters, masons, tilers, and other 'workmen of houses' along with those of 'servants in husbandry', and to regulate the prices charged by 'those who carry by land or water' and by all sellers of victuals. And they virtually created a new servant class by requiring 'every man and woman in our realm of England, or whatever condition, free or servile, who are strong in body and under sixty years of age, if they are not living by trade or exercising a craft, do not have property to live from or land to cultivate, and are not already in the service of others . . . to serve anyone who requires them in work suitable to their status (*in servicio congruo considerato statu suo*)'.<sup>182</sup> In the same spirit and in the very same month King John of France issued an ordinance regulating the economic life of Paris and its environs—the region where the Jacquerie was soon to erupt. Its first title ordered mendicants 'of whatever estate or condition, having a trade or none, both men and women', if they were 'sound in body and members', to stop their dice-playing in the streets and look for useful work, or else leave the city within three days. The ordinance went on to require tradesmen such as carters, glovers, purse-makers, stonemasons, doublet-makers, and watermen to have no more for their pains than a third above what they had taken *avant la mortalité*.<sup>183</sup>

In fact, well before the Black Death, Philip VI had cited his royal duty to provide for *le bon estat* of his people and keep them in prosperity as

<sup>180</sup> RP iii. 46b (no. 69).

<sup>181</sup> *Coutumes de Beauvaisis*, i. 446–9 (§883–6).

<sup>182</sup> SR i. 307–9, 311–13, tr. in EHD iv. 1327–1485, ed. A. R. Myers (London, 1969), 993–4; *The Cambridge Economic History of Europe*, iii. *Economic Organization and Policies in the Middle Ages*, ed. M. M. Postan, E. E. Rich, and Edward Miller (Cambridge UP, 1963), 321 ff., 404 ff.; A. Harding, 'The Revolt against the Justices', in *The English Rising of 1381*, 185–7.

<sup>183</sup> *Ordonnances des Roys de France*, ii. 350–80, 563–6.

reason for instructing everyone from rich merchants to ordinary workers to reduce their prices when he revalued the coinage, and not to continue to sell at the old rates in 'weak money'.<sup>184</sup> The growth of an urban economy enormously widened the preoccupations of government. From Philip IV's time royal orders constantly adjusted the currency, debasing the coinage in order to bring the crown a quick return or revaluing it in accordance with ideas of national interest and economic stability.<sup>185</sup> In England one of the Ordinances imposed on Edward II in 1311 required the king to consult the baronage in parliament every time he wished to change the money, since the whole populace was gravely affected in many ways. There were statutes against the corruption of English money by counterfeit or inferior coin from abroad: innkeepers at ports of passage must be sworn to search their customers for illegal money coming in and for gold and silver plate being illegally exported. Because the people of Scotland were believed to draw good silver money out of the realm and return inferior coin, the Scottish groat with a face value of four pence should be current at only threepence in England.<sup>186</sup>

By the 1350s the pressures of war and plague were binding together more tightly various strands of economic legislation produced by a longer-term commercial and governmental revolution. And the greater towns housed not only merchants, craftsmen, and shopkeepers, but people of many other 'estates': schoolmen, notaries, moneyers, and the businessmen of the king and the magnates, both lay and ecclesiastical, were based in them. Legislation forged a direct relationship between government and these urban specialists as individuals. What the merchants generally wanted were favourable trading conditions and expeditious legal procedures for registering and recovering debts wherever their business took them.<sup>187</sup> English merchants lobbied for better provision of staple ports through which the wool trade was required to pass; and asked that the companies of foreign traders which kings were anxious to encourage should be held collectively responsible for the debts of their members just as the home merchants were to aliens, for the latter were inclined to decamp without paying.<sup>188</sup>

<sup>184</sup> *Ordonnances des Roys de France*, i. 324-5, 343, 479, 532, 548, 871-3, ii. 49, 58, 490-1.

<sup>185</sup> Lot and Fawtier, *Institutions royales*, 209-16; Strayer, *The Reign of Philip the Fair*, 235, 248, 280, 335-6, 365, 392, 395-6, 416; B. Guenée, *States and Rulers in Later Medieval Europe*, tr. J. Vale (Oxford: Blackwell, 1985), 92-6, 179; P. Spufford, *Money and its Use in Medieval Europe* (Cambridge UP, 1988), 98, 127-8, 162, 204-5, 234, 236, 238, 289-318, 340, 390.

<sup>186</sup> *RP* i. 285 (no. 30), 444a (*Le tierz*), ii. 62b (no. 14), 138, 143, 253a (no. 38), 260a (nos. 32-3); *SR* i. 131-5, 200, 204-5, 219-20, 273-4, 299, 301, 320, 322-3, 395.

<sup>187</sup> *Ordonnances des Rois de France*, ii. 84-8, 202-7, 377, 489-91, 563-6; iv. 171-5.

<sup>188</sup> *RP* ii. 143, 240, 253a, 260a, 287a (no. 22), 332; iv. 421-38; *SR* i. 53-4, 98-100, 280-1.

The vital importance of urban wealth to governments compelled the admission of burgesses to the political process. Their representatives were included with those of the knights of the shires in the English parliament, while in France they were called to political assemblies as the lowest of 'the three estates', which were listed in 1355 as 'Archbishops, Bishops, Abbots and Chapters, Nobles of our blood and other Dukes, Counts, Barons, Knights and others, and also [representatives of] the Burgesses and inhabitants of Cities, Castles and large towns'.<sup>189</sup> This political categorization belied the social divisions within the urban population, which Beaumanoir emphasized in his advice to every lord of a town to inform himself each year of 'l'estat de la vile' and how it was governed by its mayor and officers. Beaumanoir was especially anxious about the frictions appearing between the richer townsmen who exercised power and the middling and poor people who had no part in government but bore the burden of taxes.<sup>190</sup> In 1354 the king of France was intent on discovering the 'Estates and Governments' of towns in a rather different sense from Beaumanoir's, that is to say the varying economic regimes of Paris and 'other places', which required different levels of wages and prices to be set 'pour tout le bon estat de la chose publique'.<sup>191</sup>

Town populations showed how heterogeneous society was: lay lords and clergy were no more homogeneous groups than the burgesses, and later medieval governments learnt to control them all by defining levels of personal status rather than by feudal monarchy's granting of territorial liberties. This went so far as to regulate the dress and diet of each rank of the social hierarchy. In the reign of Philip IV, which seems to mark a new stage of economic and social regulation, it was ordained that no *bourgeois* nor *bourgeoise* should wear fur or finery of gold, silver, or precious stones; and a clerk who was not a prelate or established dignitary should have fur only on his hood. Naturally the lower orders had to be stopped from aping their betters, but remarkably the ordinance went on to limit dukes, counts, and barons with six thousand pounds-worth of land, and their wives also, to four new robes each a year; knights, prelates, and esquires to two robes, except that a banneret or a knight with three thousand pounds-worth of land might have an extra suit for summer wear; and grooms to one set of robes, along with ladies who were not mistresses of castles or in possession of two thousand pounds-worth of land. The prices of the robes permitted to each rank and those which lords might give their retainers were

<sup>189</sup> *Ordonnances des Roys de France*, iii. 21, 173.

<sup>190</sup> *Coutumes de Beauvaisis*, ii. 266–75 (cap. 50, §1516–32); for cases in which the king showed concern for the *status ville* of Ghent and of Rouen, see *Les Olim*, ii. 174 (ix), 326–7 (x), 356–7 (xiv).

<sup>191</sup> *Ordonnances des Roys de France*, ii. 564–6.

specified, as also were the fines to be exacted from lords and their 'subjects . . . in whatever estate they are in', for offending against the ordinance.<sup>192</sup>

A further clause in Philip the Fair's ordinance 'for the tranquil state of the realm' prescribed what people might eat and drink (down to the sorts of cheese).<sup>193</sup> Especially in national emergencies, kings were beginning to use their law-making powers to impose a religious and economic discipline on their subjects. In 1336 a statute of Edward III complained of 'the excessive and overmany sorts of costly meats' consumed in England in comparison with other countries, to the grievous cost of great men and the impoverishment of the lesser people who imitated them, so that 'they were not able to aid themselves nor their liege lord in time of need as they ought'. For 'the honour of God and amendment of the state of the community of the realm', it was therefore ordained and established that no one 'of whatever estate or condition he may be' (the now commonplace expression) should 'cause himself to be served in his house or elsewhere, at dinner, meal or supper, or at any other time, with more than two courses and each mess of two sorts of victuals at the utmost'.<sup>194</sup> The Hundred Years War with France was about to begin, and Edward's statute fits into a series of economic measures preventing trade with the enemy and at the same time protecting English money and the English cloth industry: in the following year the export of wool was prohibited along with the use of foreign cloth and the wearing of fur by any 'man or woman of whatever estate or condition'—except for the royal family, nobles and knights and their ladies, and churchmen who spent more than £100 of their benefices in a year.<sup>195</sup> The point of the poll-taxes which provoked the English rising of 1381 was that all the servant class, 'both male and female', should contribute to the salvation of the realm according to their state of affluence.<sup>196</sup>

A new style of governance which had been developed in an urban context, first of all to exploit the Jewish minority, was being extended to everyone in the community, but legislation in England responded to the petitions of the gentry and rich merchants forming the Commons in Parliament and naturally reinforced social hierarchy. The major English sumptuary statute of 1363 answered a petition of the Commons against 'the excesses of apparel of people beyond their estate . . . by which cause

<sup>192</sup> *Ordonnances des Roys de France*, i. 324–5, 541–3; P. S. Lewis, *Later Medieval France, The Polity* (London, 1968), 172–3, 187, 243.

<sup>193</sup> *Ordonnances des Roys de France*, i. 324, 541–3.

<sup>194</sup> SR i. 278–80; F. E. Baldwin, *Sumptuary Legislation and Personal Regulation in England* (Baltimore: Johns Hopkins UP, 1926); Alan Hunt, *Governance of the Consuming Passions: A History of Sumptuary Law* (London, 1996).

<sup>195</sup> SR i. 280–1.

<sup>196</sup> RP iii. 90 (15).



all the wealth of the realm is consumed and brought to nothing', and marked off a wider range of estates than had Philip the Fair's ordinance. Servants should wear vesture not exceeding two marks (26s. 8d.) for the whole cloth in price, their wives and daughters 'no veils passing 12d. a veil'; 'people of handicrafts and those called yeomen by office', no cloth more than 40s. and no silk or jewellery, their wives veils 'only of yarn made within the realm' and fur only of 'coney, cat and fox'. 'Esquires and all manner of gentlemen under the estate of knight' having land to the value of £100 a year, and clergy of the same wealth, were permitted cloth within the price of four and a half marks (60s.); esquires with land to the value of 200 marks (£133 6s. 8d.) cloth priced at 5 marks and apparel of silk and 'reasonably garnished with silver', their womenfolk miniver. 'Merchants, citizens, and burgesses, artificers, and people of handicraft, as well within the city of London as elsewhere' were ranked with the hundred-pound landed gentlemen if they possessed goods and chattels worth £500, with the wealthier esquires if they had £1000. Knights and clergy with the same landed wealth as the greater esquires were allowed cloth priced at six marks, and to wear lawn in summer as they wore fur in winter. Richer knights and ladies with land or rent up to £1000 might wear what they liked, ermine still excepted: by implication, nobles wealthier still were subject to no restriction.<sup>197</sup>

In the following year the Commons changed their mind and asked that all people in the realm might trade freely and, 'of whatever estate or condition', freely 'order provision in living and apparel' as seemed best for themselves, their wives, children, and servants. The ordinance of 1363 was duly repealed, but its social categories were still maintained a hundred year's later, when the Commons petitioned Edward IV for the re-enactment of his progenitors' ordinances and statutes against 'immoderate array'. Only the details of the resulting statute, and of another in 1482 replacing all previous sumptuary laws, were new: for example, 'no knight under the estate of a lord, [no] squire or gentleman, nor other person' was to wear any 'gown, jacket or cloak but it be of such length, as it, he being upright, shall cover his privy members and buttocks'.<sup>198</sup>

Most fundamental for the building of the state, was royal legislation which corralled the lords into an estate. The lords of England and France took their places in the new political assemblies created by Edward I and Philip the Fair. The English aristocracy did so in the persons of the 150–200 barons the king might summon by means of individual writs to an early fourteenth-century parliament along with 50–100 bishops and abbots, and of the two representative knights from

<sup>197</sup> Ibid. ii. 278–82; SR i. 378–83; tr. in *EHD* iv. 1153–5.

<sup>198</sup> RP ii. 286, v. 504–5, vi. 220–1; SR i. 383, ii. 392–402, 468.

every county whom he might order sheriffs to see elected along with two burgesses from each of the larger towns. (The knights and burgesses were joined in the 'model parliament' of 1295 and occasionally thereafter by procurators of the lower clergy.)<sup>199</sup> The French barons were first summoned in 1302 and 1308 along with procurators of the clergy and the communes to deliberate with King Philip on matters 'touching the honour, state and ancient liberty and defence of our realm and of the churches, ecclesiastical persons, barons, other nobles and inhabitants of the said realm'.<sup>200</sup> This inevitable recognition of the landed power and military importance of the aristocracy also placed them in a constitutional relationship with other estates. The burgesses were emerging as a force in politics with which the lords had to come to terms. The result of Edward I's inclusion of town representatives in parliaments for the easier negotiation of taxes and customs duties was the ability of the Commons in his son's reign to advance a whole programme of bills on economic matters, and their taking the lead in assenting to fiscal legislation.<sup>201</sup> In France, according to J. R. Strayer, it would have been impossible to have convoked the great assemblies which Philip the Fair used to combat Pope Boniface VIII and suppress the Templars without the pattern of representation largely set by the chartered towns.<sup>202</sup> The towns also contributed energy and purpose to the provincial meetings of estates to answer the king's fiscal demands, which were as important in late medieval France as the infrequent meetings of the Estates General of France, or of Languedoc, or Languedoc.<sup>203</sup>

The French nobility continued to receive confirmation of its privileges, but as part of general grants to the whole communities of the various *bailliages*, 'nobles and non-nobles', grants made avowedly out of consideration for 'the state and reformation of our realm': in fact in return for subsidies payable by everyone according to the 'worth and status of their persons and households'.<sup>204</sup> The nobles then began to look for a new privilege—exemption from royal taxation on the grounds that their contribution to the country's defence was in the field, so that more even than in England, the third estate was left the function

<sup>199</sup> J. G. Edwards, *The Commons in Medieval English Parliaments* (U. of London: Creighton Lecture, 1958); Harding, *England in the Thirteenth Century*, 144, 148, 218–19, 221–2, 226.

<sup>200</sup> *Documents relatifs aux États Généraux et Assemblées réunis sous Philippe le Bel*, ed. G. Picot, Collection de Documents inédits sur l'histoire de France (Paris, 1901), 26, 491.

<sup>201</sup> W. M. Ormrod, 'Agenda for Legislation, 1322–c.1340', *EHR* 105 (1990).

<sup>202</sup> Strayer, *Reign of Philip the Fair*, 110–11, 271–2, 275, 277.

<sup>203</sup> R. Fawtier and A. Coville, *Histoire du moyen âge*, vi (Paris, 1940–1), 253 ff., 524–6; Lot and Fawtier, *Institutions royales*, 547 ff.; Lewis, *Later Medieval France*, 328 ff.; Guenée, *States and Rulers in Later Medieval Europe*, 221.

<sup>204</sup> *Ordonnances des Roys de France*, ii. 84–5, 120–8, 173, 262, 395, 410, 503, 507, 529, 531, 557, iii. 21, 675; Artonne, *Le Mouvement de 1314*, 163–74, 198–204, 207, 209, 212.

of placing a check on the king's fiscal demands. Entry to this privileged estate could be gained by purchasing a royal *lettre d'anoblissement*, but this was necessary only when a man's status was not clear from his membership of an ancient lineage and military prowess, typically if he was a royal lawyer or bureaucrat with urban origins. Nobles were men 'living nobly' and 'frequenting the wars': if they were detected staying at home and becoming innkeepers, they risked losing status and privilege.<sup>205</sup>

Yet the titled nobles were a permeable group within a landed aristocracy of knights, esquires, and gentlemen which was itself open-ended and needed to be replenished as lineages died out. The sumptuary laws indicate that the real determinant of status in the upper levels of society was the extent of the landed income which allowed 'noble living' and this was subject to all sorts of pressures. The largest mass of early legislation consequently protected landed rights, and was inspired first of all by the efforts of the lords, the king at their head, to maintain the value of feudal services. Vassals more and more bought, sold, and divided their fiefs for family or commercial reasons. But lords were also vassals. Efforts to stop the dismemberment of fiefs by insisting on succession by primogeniture could not succeed against customs of provision for younger children.<sup>206</sup> The Customs of Paris, the law-book of the French heartland, accommodated the rules of feudalism as they were confirmed by the *établissements* of Saint Louis to the economic exigencies of the city.<sup>207</sup> The king himself might buy up rear-fiefs to extend his demesne, while demanding that his vassals purchase licenses to sell their fiefs or enfranchise their serfs. (The royal spoiling of the land-market in this way was one of the provocations of the leagues against Philip IV and Louis X.) In 1275 the king began to allow non-nobles who had acquired fiefs within his demesne to retain them on payment of a number of years income from the land, thus creating a *droit de franc-fief* which his successors renewed, steadily racheting up the price.<sup>208</sup>

In England Henry III had found 'the Crown and royal dignity . . . intolerably damaged' by the alienation of lands held of the king in chief, and in 1256 ordered sheriffs to seize lands so alienated without his

<sup>205</sup> Olivier-Martin, *Histoire du droit français*, 2nd imp. (Montchrestien, 1951), 637–42; Lewis, *Later Medieval France*, 97–8, 104, 174–6, 180–1, 226, 366–7; J. Rogozinski, 'Ennoblement by the Crown and Social Stratification in France 1285–1322', in *Order and Innovation in the Middle Ages: Essays in Honor of Joseph R. Strayer*, ed. W. C. Jordan, B. McNab, and T. F. Ruiz (Princeton UP, 1976); Guenée, *States and Rulers in Later Medieval Europe*, 180, 191.

<sup>206</sup> Lewis, *Later Medieval France*, 177; E. Miller, 'The State and Landed Interests in Thirteenth Century France and England', *TRHS*, 5th Ser. 2 (1952); Olivier-Martin, *Histoire du droit français*, 243–4; Lot and Fawtier, *Institutions royales*, 171, 384.

<sup>207</sup> *Ordonnances des Roys de France*, i. 107–294.

<sup>208</sup> *Ibid.* ii. 556.

specific licence.<sup>209</sup> The barons petitioned Edward II in 1325 that the rule should not apply to lands they acquired within honours that had escheated to the king for rebellion, and were answered that in this matter 'the king should have the same estate as the lords'.<sup>210</sup> It was avowedly on behalf of 'magnates and others' that Edward I's Statute of Quia Emptores sought in 1290 to prevent the loss of rights to escheats, marriages and wardships by their vassals' alienations; the purchaser of a fief or part of one must in future replace the vendor in the feudal hierarchy and assume a just proportion of his services to the chief lord. The statute in fact took the heart out of 'feudalism' by preventing the creation of new social bonds by subinfeudation, and the most significant words of the enactment were the first: 'that henceforth it is to be lawful for each free man to sell or will his land or tenement'.<sup>211</sup> The 'fee simple' became a straightforward unit of landed property, like the *franc-fief* the acquisition of which by non-nobles Philip IV once again admitted in 1291 with a specification of extra payment if there was 'abridgement of services'.<sup>212</sup>

A private law rooted in common rules of fief-holding developed in similar ways in the two countries, but royal legislation changed it more obviously in the smaller country, with its stock of procedures by chancery writ and a tighter administration to apply them. The modes of possession and inheritance of feudal property in France were set out in the *établissements of Saint Louis*, a private compilation of the early 1270s (though taken for legislation and thus included in 1723 in the first volume of the *Ordonnances des Roys de France*), and in Beaumanoir's *Coutumes de Beauvaisis*.<sup>213</sup> The systematic amendment of English private law was at the heart of the 'establishments' promulgated by Edward I in the parliaments held at Westminster in 1275 and 1285 'to set to rights the state of his kingdom'. Westminster I has clauses prohibiting magnates from impoverishing houses of religion by excessive demands for entertainment, and on how they should exercise their rights of wardship; a dozen chapters deal exclusively with civil procedure, curbing the power of defendants to delay cases, bringing forward the dates of limitation from which plaintiffs had to prove their right in various actions, widening the circumstances in which actions for dower and the petty assizes could be pursued and ending with a royal request to the bishops that assizes 'might be taken in Advent, on

<sup>209</sup> *EHD* iii. 360–1.

<sup>210</sup> *RP* i. 430 (no. 3).

<sup>211</sup> *SR* i. 106; tr. in *EHD* iii. 466; T. F. T. Plucknett, *The Legislation of Edward I* (Oxford: Clarendon Press, 1949), 102–8.

<sup>212</sup> *Ordonnances des Roys de France*, i. 323–4 (c. 9).

<sup>213</sup> *Ibid.* i. 161, 200–1, 276–7 etc.; Olivier-Martin, *Histoire du droit français*, 117; *Coutumes de Beauvaisis*, chs. xiv, xlvii etc.

Septuagesima and in Lent'. These chapters and the many strengthening legal process in Westminster II are of a similar sort to the orders of the *parlement* of Paris. But the second statute goes further in creating new grounds of action.<sup>214</sup>

The first chapter of Westminster II, *De donis conditionalibus*, provided writs of 'formedon' in addition to that already 'in common use in the chancery' to enforce the terms of an entail: that is, a gift to a couple (typically, to the donor's daughter and her husband when they married) and the heirs of their bodies, so that the donees might not alienate the property. If they had no heirs or (as it came to be interpreted) their line died out in a subsequent generation, the statute decreed that the land should revert to the donor or his heirs.<sup>215</sup> So were laid the foundations of the mass of law allowing conveyancers to create and to 'bar' (or break) entails on which depended both the preservation and exploitation of blocks of landed power, and therefore the status of English landowners, for centuries to come. The fact was registered in new meanings of 'estate' itself. It was a person's 'standing' in terms of landed property which was becoming definitive. Bracton has the demandant in an assize of mort d'ancestor pleading that the ancestor 'never withdrew from seisin or changed his *status* in any way', but 'died seised as of fee', and asserts that 'the status of a minor ought not to be changed, either with regard to tenements or services and customs'.<sup>216</sup> This use of *status*, or rather *e(s)tat* in its law-French form, was appropriated by the lawyers who compiled the reports of legal arguments in the king's courts surviving from the later years of Edward I's reign, because they needed a word to cover the various interests in land which multiplied with the development of a law of entail. Beside the 'estate in fee simple', and the temporary enjoyment of property as a lessee, doweress, or tenant at will, there came to be recognized the estates in fee tail or 'cut-down' fees (from Fr. *tailler*, to cut) of those whose right was conditional on the birth of heirs, and the 'future estates' or 'estates in expectancy' of those to whom the settlement gave a right to the 'remainder' or the 'reversion' of the land according to the settlement.<sup>217</sup> A report of the case of 1312 in the Court of Common Pleas in which Chief Justice Bereford first interpreted the *De donis* prohibition of the alienation of the gift as extending beyond the original donees has the judges and pleaders arguing about the nature of the estate that was passed on; in 1347 the Commons maintained that it was an estate for life only and that the

<sup>214</sup> SR i. 26–39, 71–95; tr. in EHD iii. 397–410, 428–57.

<sup>215</sup> EHD iii. 428–9.

<sup>216</sup> Bracton on the Laws and Customs of England, tr. Thorne, iii. 39, 90, 282, 290 (fos. 170, 192b, 266b, 270), iv. 316–17 (fo. 423b); W. S. Holdsworth, *A History of English Law*, 3rd edn. (London, 1923), ii. 350–2, iii. 101 ff.

<sup>217</sup> T. F. T. Plucknett, 'Words', *Cornell Law Quarterly*, 14 (1929).

holder of it should therefore be liable to an action for waste if he ran it down. The sum of a landowner's various interests in land, including what he might hold as security for loans, made up his 'estates'.<sup>218</sup>

'Estate' acquired a technical sense in French legal procedure also, in the royal *lettres d'état* protecting from law-suits the property of officials while they were away on the king's business and of aristocrats serving in his wars. The restoration of a person's 'state' in terms of his property was a principle of canon law, also discernible in imperial *acta* and in the proceedings of *parlement*, that a disputed right should be held *in statu in quo est* while the suit was in progress.<sup>219</sup> An ordinance of 1345 recognized that the merchants of France were greatly damaged by the obtaining of 'letters of respite and state' by their debtors.<sup>220</sup> In both France and England the landed aristocracy were quintessentially 'great states' by reason of their property. The polysemy of '(e)state' made it specially able to catch the multiple facets of social authority. The fifteenth-century English translation of a French political tract of 1347 gives advice as to how 'kynges, Princes and othir lordys and estates may condué [conduct] theire estatcz, and how the seid grete lordys of this worlde may knowe and sette good governaunce in their owne persoones, in their peeple and in theire seinieuryes and lordshippes': a prince or 'greet estate of this worlde' must 'see that his householde, his demaynes, his meynee and servauntz and alle his othir menage ben well rewlid and governyd'.<sup>221</sup> (At the end of the middle ages the ruling oligarchy of a town like Coventry or Gloucester could also be called 'the mayor and the states'.)<sup>222</sup>

The lay aristocracy ranked behind the higher clergy, who were marked off as the first estate by the possession of legal privileges which no less defined and confined their role within the state of the realm. The clergy as a whole—men identifiable by their tonsure—covered the entire spectrum of wealth and poverty: they were supposed to be at least of free status, which did not stop parsons in England from sometimes trying to claim parochial chaplains as their servants under the terms of the Statute of Labourers.<sup>223</sup> They were treated as constituting a separate 'estate and member of the commonwealth' because of their function,

<sup>218</sup> J. H. Baker and S. F. C. Milsom, *Sources of English Legal History: Private Law to 1750* (London, 1986), 52–3; *RP* ii. 170b (46); *ibid.* vi. 206a, for a good example of the variety of 'estates' in land in 1482.

<sup>219</sup> *Les Olim*, ii. 180 (xxix), 347 (xxxii); G. Tessier, *Diplomatique royale française* (Paris, 1962), 235, 265.

<sup>220</sup> *Ordonnances des Roys de France*, ii. 240–1 (c.8), 507 (c.11), iv. 432, 576, 661 etc.

<sup>221</sup> *Four English Political Tracts of the Later Middle Ages*, ed. J.-P. Genet, Camden 4th ser. 18 (London: Royal Historical Society, 1977), 174, 180–1, 183–5.

<sup>222</sup> Examples in *OED*, s.v. *state*, 25.

<sup>223</sup> Bertha H. Putnam, *The Enforcement of the Statute of Labourers* (New York, 1908), 187–9, 213, and appendix, 11–12, 141, 171, 432–3.

which (according to the harangue of Sir Philip de Poitiers at the Estates-General at Tours in 1484) was to pray for, counsel, and exhort the other estates, as the nobility's function was to protect clergy and people by arms, and the people's 'to nourish and sustain the nobles and clergy with payments and produce'.<sup>224</sup> Churchmen themselves were divided into distinct 'orders' and 'grades', each with a different function. In the thirteenth century Aquinas discussed the virtues and vices peculiar to different estates of men (*speciales status hominum*) as shown by their actions, asking whether a philosopher's life was better than a politician's, a monk's than a bishop's; he concluded that the Church depended on the diversity of offices and states (*officiis et statibus*) within it, the active *status praelatorum* as much as the contemplative *status religiosorum*.<sup>225</sup>

It was the actions of prelates, and the laity's resentment at the privileges of the wealthier churchmen which prelates defended, that added to the king's traditional concern for the *status ecclesiae* a determination to set limits to the clergy's state. At a parliament at Carlisle in 1307 'the earls, barons and all the community of the land' (including on this occasion proctors of the lesser clergy) petitioned Edward I against the papal provision of aliens to English benefices 'in abasement of God's law, & undoing of the state (*l'estat*) of holy Church . . . & in subversion of the whole state of the Realm': the right of presentation to livings should rest with the king and the lords whose ancestors had founded the Church in England 'in all these states (*estats*) of prelacy'.<sup>226</sup> The complaint against this and other papal exactions was presented 'for the state of the royal crown and of the said king's lands of Scotland, Wales and Ireland, and for the whole community of England', and a statute, directed principally against the draining abroad of the endowments of religious houses, which should have relieved the sick and the poor and maintained prayers for the founders, was made for 'the common utility of the people of our realm, and for the betterment of the state of our whole lordship'.<sup>227</sup> At the end of the fourteenth century Wyclif and his followers placed on the king a general duty of seeing that priests did not 'pass their state in God's law' and seek to do the offices of knights: only the 'worship of lords' was properly 'grounded in states', while the 'worship of priests' was 'grounded in virtues' and in preaching, contemplation, and prayer.<sup>228</sup> The clergy's landed wealth remained virtually intact till the Reformation, but French ordinances beginning in 1275

<sup>224</sup> Jehan Masselin, *Journal des États Généraux de France tenus à Tours en 1484*, ed. A. Bernier (Paris, 1835), 504–5; Lewis, *Later Medieval France*, 168–70.

<sup>225</sup> Gratian, *Decretum*, Dist. XXV; Aquinas, *ST* II-II, [*Secunda Secundae*] qq. 183–6.

<sup>226</sup> *RP* i. 217–20.

<sup>227</sup> *SR* i. 316.

<sup>228</sup> *Four English Political Tracts*, ed. Genet, 13–14.

and the English statute of mortmain of 1279 (this latter anticipated by a baronial provision of 1259) forbade new alienations of fiefs to churches, whereby service for the defence of the realm and escheats of the lands to overlords were lost, except with the overlords' permission; royal licences also became available for such acquisitions, at a price.<sup>229</sup>

By the French ordinances churches were allowed to keep unauthorized gifts 'in free alms' at a lesser cost than lands they bought, and in England the Prior of Durham is found petitioning the king to be fined by the justices in eyre 'according to his state': not at the punitive level of a baron, but as one holding his (extensive) lands 'in pure and perpetual alms'.<sup>230</sup> The landed wealth and privileges of churchmen were not exempt from royal regulation on the grounds that they were held for spiritual purposes. Chapter 41 of Westminster II indeed ordered the confiscation and return to the king or other lord of lands given by them or their progenitors 'in free alms' for the purpose of founding religious houses, if their heads ever sold the property 'contrary to the form of the gift' (words reminiscent of the first clause of the statute about entail). It also extended the penalty of forfeiture for the alienation of lands in mortmain to the avoidance of feudal services by the erection of crosses in tenements so as to claim the privileges of the crusading orders of Templars and Hospitallers.<sup>231</sup> The legal privilege known as 'benefit of clergy', the right of clerks arraigned for crimes in the king's courts to be transferred to the custody of their bishops, was watched over carefully by royal judges to see that they did not escape punishment.<sup>232</sup> Edward I's order of 1286 to his justices to 'go carefully' (*circumspecte agatis*) in their dealings with the bishop of Norwich and his clergy, who had been resisting what they regarded as encroachment on their jurisdictional privileges, gave such a precise list of cases belonging to the church courts (e.g. fornication, adultery, cases between rectors about tithes—the tenth of all growing things which were owed to the church to support its spiritual purposes—provided less than a quarter of a church's value was in dispute) that it was soon cited as a statute.<sup>233</sup>

The demands of the Church on the resources of the laity, and the reciprocal insistence of kings that clerks must contribute in proportion to their great wealth to taxes for the defence of the realm did most to mark off the clerical estate politically. This was true in England as well as France, though the divisions between estates were blurred in a parliament of two houses, the Lords including bishops and abbots with

<sup>229</sup> *Ordonnances des Roys de France*, i. 303–7, 322–4, 745; Stubbs, *Charters*, 393, 451; tr. EHD iii. 419–20; S. Raban, *Mortmain Legislation and the English Church 1279–1500* (Cambridge UP, 1982).

<sup>231</sup> EHD iii. 447 (c. 33), 452 (c. 41), 453 (c. 43).

<sup>232</sup> Harding, *Law Courts of Medieval England*, 44–5.

<sup>233</sup> EHD iii. 462–3.

<sup>230</sup> RP i. 166b (no. 68).



the lay nobility, the Commons embracing the lesser landlords along with the burgesses but without permanent clerical representation. The English clergy's choice to respond to the king's fiscal demands separately in the convocations of Canterbury and York left them more vulnerable to attack by a jealous laity. The Commons were quick to complain of perceived attempts by the bishops to demand payment of tithes from 'every sort of wood, which was never done before', and to allow a serf or a wife (of anyone) to make a will, 'which is against reason'. They petitioned Edward III that in these matters 'his people might remain in the same state that they were accustomed to, in the time of all his progenitors', and that prohibitions be issued to stop the church courts hearing cases of tithes of wood; and in 1371 they secured, by a statute which they repeatedly invoked, the definition of tithable wood as only coppice wood less than twenty years old.<sup>234</sup>

The struggle between the papacy and the kings of France and England precipitated by *clericis laicos*, the bull of 1296 in which Boniface VIII lamented the habitual hostility of 'laity to clerks' and forbade the taxing of the clergy by princes without his permission, was the turning-point in the replacement of pope by prince as the guardian of a national church—the *ecclesia Gallicana* or 'the church of England'—and the identification of the clergy as another estate of the commonwealth.<sup>235</sup> At the beginning of the thirteenth century Innocent III, the greatest of papal legislators, had summoned the Fourth Lateran Council to change what, in the changing times (*secundum varietatem temporum*), 'urgent necessity and evident utility' required to be changed in 'the common state of the whole body of the faithful': one of the council's decrees had permitted clerical contributions to public finances—but only if bishop and clergy made them voluntarily, judging that they would provide for 'common benefits and needs'.<sup>236</sup> At the end of the century, Boniface VIII was eventually forced to concede in the bull *Etsi de statu* that, 'although the state of every kingdom' was the pope's concern, Philip IV might tax the clergy when he, the king, decided that France was threatened by a 'perilous necessity'.<sup>237</sup> The king prevailed over the pope by rallying to his cause all sections of the people, including the French clergy, in the first national assemblies, called to deliberate on matters touching 'the honour, state and ancient

<sup>234</sup> RP ii. 142b (51), 149b (no. 9), 150a (no. 9), 305b (23), 319a (21), iii. 43b (47), 201a (21), 318a (13), iv. 21a (19), 451a (55) etc.

<sup>235</sup> Guenée, *States and Rulers in Late Medieval Europe*, 166.

<sup>236</sup> *Conciliorum Oecumenicorum Decreta*, Centro di Documentazione Istituto per le Scienze Religiose, Bologna (2nd edn. Freiburg im Breisgau, 1962), for the decrees of the Fourth Lateran Council, esp. 231, 233–4 (cc. 46, 50).

<sup>237</sup> The bull *Etsi de statu* can be found in *Les Registres de Boniface VIII*, i, ed. A. Thomas, M. Faucon, and G. Digard (Paris, 1907), col. 942 (no. 2354).

liberty and defence', not only of his realm of France but also of ecclesiastical persons, 'li generaux estats de l'Eglise' and the 'barons and other nobles and inhabitants of the said realm'. In the *statuta utilia et salubria* he made in 1302 for the reformation of the 'government and good state' of his kingdom, which was 'bowed down in the past by the adversities of the times and wars and many other contrary events', and 'also for the peace and tranquillity' of his subjects, Philip placed first a confirmation of all the privileges and liberties of churches and 'ecclesiastical persons' and injunctions to his servants to observe them, but clearly in the context of a newly vigilant supervision of those liberties. The fiscal demands of the war between France and England completed the definition of the clerical estate alongside the estates of the lay aristocracy and the burgesses.<sup>238</sup>

#### THE LAW OF INJURIES AND THE PUBLIC PEACE

The final way in which kings legislated for the state of their realms was to curb the injuries of their subjects to each other. According to Beaumanoir the traditional rules of the feud allowed particular members of warring kindreds to disown a settlement arranged by their friends, but if they failed to do so publicly and still carried on the feud, they could be arraigned for treachery and breach of the peace (*pes brisiée*) and hanged.<sup>239</sup> Saint Louis's successors continued his attempt to impose this sort of peace at home, in order to leave them unimpeded in their wars abroad. In 1303 Philip IV issued a 'general statute' to all his subjects in every part of his realm, 'of whatever estate or condition', forbidding wars, battles, killings, the burning of townships and homes, attacks on farmers or ploughmen, and—at least 'during our wars'—all duels; local customs allowing feuding were declared null and void, since they were contrary to 'good morals and the profit, good state and healthy governance of the people'. Eleven years later King Philip needed again to order the cessation of wars within the realm *guerra nostra durante*, when the count and people of Flanders broke the peace-treaty (*forma pacis*) made with them and waged 'open war'. In the middle of the fourteenth century King John of France denounced the nobles and others who ignored the frequent ordinances he had made against private war *pour cause de noz guerres*, and were now making 'defiances and wars' with each other 'under the shade of the peace published in our

<sup>238</sup> *Documents relatifs aux États Généraux et Assemblées réunis sous Philippe le Bel*, ed. Picot, I, 5, 8, 14, 15, 26; J. H. Denton, 'Philip the Fair and the Ecclesiastical Assemblies of 1294-5', *TAmPhilSoc*, 81, part 1 (Philadelphia, 1991), 35, 38; *Ordonnances des Roys de France*, i. 354-68, and cf. ii. 84-5, 557, 563-6, iii. 21, 173.

<sup>239</sup> *Coutumes de Beauvaisis*, ii. 359-65 (§1677-89).

realm'. Acts of vengeance against any persons were forbidden, so long as the king's enemies were within the realm, and lords who failed to restrain their people would be summoned to answer in *parlement*, notwithstanding their privileges and customs.<sup>240</sup>

Of course crimes had to be avenged and malefactors chastised, but where it was legitimate, vengeance was to be taken judicially in the name of the king's peace, which reached beyond the feuding nobles to subjects at all levels. The definitions of the various sorts of crime which Beaumanoir sets out, the ways of prosecuting them, and the 'vengeance' appropriate to them had been worked out largely by custom and practice in local courts, and rather than legislate on the content of the criminal law, king and *parlement* gave new vigour and discipline to its enforcement. Crimes on the most serious of the three levels that Beaumanoir describes (murder, treason, homicide, rape, larceny by night, obdurate heresy, sodomy, and making false money) were prosecuted either by 'appeals' (private accusations which the appellants offered to prove by defeating the accused in combat), or by denunciations of crimes to a justice as notorious and his public duty *à vengier*; and the vengeance for them was death in various guises (for making false money it was 'boiling' before hanging). These capital crimes, along with the breaking of truces and of mutual pledges of peace, were within the jurisdiction of the possessors of *haute justice* only.<sup>241</sup>

But Beaumanoir knows a number of less menacing forms of theft which were not capital (and therefore lay within lower jurisdictions), and a whole second level of offences punished by imprisonment and fines, and follows it with a third level avenged by fines alone, both the terms of imprisonment and the size of the fines varying according to the gravity of the misdeeds and the 'estates' of the malefactors and the injured parties. In the second category Beaumanoir puts maiming, no longer subject, he says, to the law of talion, which 'in the old law' had demanded a hand for a hand and a foot for a foot; a serf's insulting of an aristocrat; and the conspiracies of the people which were especially to be feared. In the third category were misdemeanours like abusive behaviour and assault and battery which carried fines of 5*d.* if by peasants and 10*s.* if by gentlemen; unless, that is, it was done in court before a *bailli* or *prévôt*, or addressed to a serjeant, or the assault broke the skin of the victim (bloody noses were ignored), or disrupted a market, when a peasant paid 6*s.* and a gentleman 60*l.*<sup>242</sup>

<sup>240</sup> *Ordonnances des Roys de France*, i. 328, 357, 390, 538, ii. 507-8 (cc. 13-15), 531, 569, iii. 138-9 (c. 34), 525, 647 (c. 8).

<sup>241</sup> *Coutumes de Beauvaisis*, i. 104-5, (§§207-8), 428-75 (chapter xxx), ii. 163 (§1286), 343 (§1647-8), 348-9 (§§1656-8), 375-7 (§§1709-14), iii. 124-42; cf. *Ordonnances des Roys de France*, i. 108, iii. 144 (c. 55).

<sup>242</sup> *Coutumes de Beauvaisis*, i. 428-9 (§823), 433-49 (§841-86).

Beaumanoir makes actionable all injuries to persons or property by force, threat of force, or fraud. Prosecution by appeal and trial by battle are possible in the case of fraud, but this was a hazardous process which victims would have used against the graver crimes only: denunciation to the commissioners of royal inquests was the mechanism by which most of the vast area of injuries to other people's property or persons was brought within the province of the law. The bullying, *tricherie*, and extortion of their own officials were a prime target of kings concerned for the 'peace and tranquillity' of their subjects.<sup>243</sup> The monopoly of 'legitimate force' which has been seen as the essential attribute of the modern state needed assertion in the thirteenth century against the institutionalized violence of officialdom itself. Before royal *enquêteurs* people alleged that they had been injured 'by the king's violence' (*per vim regis*): for instance by the quarrying of a complainant's land of stone for fortifications, or by an official's compulsion, 'by violence because he was a bailiff' (*per violenciam quia ballivus erat*), of the payment of a debt unjustly claimed by a Jew.<sup>244</sup> Alfonse of Poitiers departed on crusade in 1249 giving his executors power to do justice on his wrongs (*forefacta*) and those of his bailiffs; and two years later Alfonse's subjects are found complaining of the many injuries inflicted on them by the violence of the count's servants or 'of the bailiffry', such as the seizure and holding to ransom of bread baked in communal ovens. In 1270 the *parlement* at Toulouse was hearing complaints of *injurias et violentias*. But marauding in arms (*cum armis*), the 'violent asportation' (carrying off) of crops and goods of all sorts, false imprisonment and beating (*verberatura*) of persons, threatening behaviour (*minacitas*), and defamation such as pointing out Jews and others as 'public usurers' were of course wrongs not confined to officials, and, whoever committed them, they now called for redress as offences against the king's peace rather than as incidents of private war.<sup>245</sup>

The existence of plea-rolls and registers of writs sheds extra light on the same development of a comprehensive law of tort (wrongdoing) in England. At the time that plea-rolls began to be kept in the late twelfth century, the appeals of the victims or their kinsmen were the only means to obtain redress for specific crimes: it was notorious criminals that the presenting juries initiated by Henry II were devised to catch. Fighting

<sup>243</sup> *Coutumes de Beauvaisis*, i. 363 (§711), 428–84 (caps. xxx–xxxix), 500–5 (cap. xxxiii), ii. 340–1 (§1642), iii. 140–2.

<sup>244</sup> *Recueil des historiens*, vol. 24, ed. Delisle, pp. 296\* (Preuves de la préface, no. 91), \*307 (no. 124: *minatus ad mortem*), \*323–324\* (no. 106), 328\*–\*329 (no. 240: *in novis desaisinis, violentiis seu fortiis . . . vi et cum armis*); *ibid.* 6, 15–16, 73–4, 301, 303, 440, 486.

<sup>245</sup> *Enquêtes administratives d'Alfonse de Poitiers*, ed. Fournier and Guebin, 14, 20–1, 302 (no. 122); Artonne, *Le Mouvement de 1315*, 171–5.

the appellee, as the appellant was required to do, was an unattractive way of seeking revenge for any but the most serious felonies like murder and arson, and the courts punished attempts to use appeals simply to force opponents to come to terms and pay damages. But plaintiffs saw that when their 'appeals of felony' were disallowed, the judges were nevertheless obliged to take a verdict from a jury on the accused's guilt or innocence of 'trespass against the king's peace' (*transgressio contra pacem domini regis*); moreover, the inquiries into complaints against officials would have taught injured parties—or their attorneys—that this obligation might be activated by a simple complaint (*querela*) that a wrong had been committed in some aggravated circumstance—by night (*noctanter*), or in breach of a special protection or liberty granted by the king, or on the king's high road, or simply and most commonly 'with force and arms' (*vi et armis*). In the middle of the thirteenth century, actions of trespass brought by writ start to turn up, and the first writs of trespass take their place in registers of writs. Significantly they do so immediately after writs *De Minis*, ordering sheriffs to confer the king's special peace on threatened persons, an essential mechanism in an age of abuses of power and protection rackets.<sup>246</sup>

The writ of trespass was important both because it placed the award of damages for personal injury alongside the judging of entitlement to land as a major purpose of the common law, and because the manner of its origin set few limits on the kinds of injuries it would cover. The developed action of trespass simply required that the plaintiff should allege damage inflicted on him *vi et armis et contra pacem domini regis* and the defendant deny *vim et injuriam* ('force and tort'). Rather than a substantive concept, trespass was a method of labelling cases in order to bring before the king's court grievances perceived by a far wider section of society than the landowning classes. The first civil actions of trespass were broadly distinguished into cases of breaking into the plaintiff's property (*quare clausum fregit*), appropriation of his goods (*de bonis asportatis*), and assault and battery (*quare ipsum insultavit, verberavit et maletractavit*).<sup>247</sup> But the variety of complaints made it necessary for the royal chancery to devise further writs of 'trespass on the case' in which special circumstances might be recited in '*cum*-clauses' and the allegation of 'force and arms' dropped as an obvious fiction: for

<sup>246</sup> *The Roll of the Shropshire Eyre of 1256*, ed. Harding, pp. xxxii–lviii; *Bracton on the Laws and Customs of England*, tr. Thorne, ii. 402–13, 437–8.

<sup>247</sup> S. F. C. Milsom, 'Trespass', *Law Quarterly Review*, 74 (1958), 195–224, 407–36, 561–90; *Select Cases of Trespass from the King's Courts*, ed. Morris S. Arnold, Selden Soc. 100, 103 (London, 1984, 1987); Robert L. Palmer, *English Law in the Age of the Black Death 1348–1381* (Chapel Hill and London: North Carolina UP, 1993).

instance, an innkeeper might be summoned to show why, whereas (*cum*) by the custom of England he had a duty to look after his guests' possessions, he had allowed the plaintiff's horse to be led away.<sup>248</sup> Alongside writs of trespass in the *Register* and sharing with them the 'summons to show why' (*summone N ostensurus quare*) formula of actions for tort, appeared writs of Deceit and *Assumpsit*, both concerned with the breaking of agreements, either fraudulently or by omission or positive negligence, which had previously not been actionable in the absence of a written deed of covenant. Deceit, like that alleged in 1387 against a man who sold a horse which died within days of his warranting it to be 'sound and suitable' did not even need the backing of *contra pacem domini regis*.<sup>249</sup> *Assumpsit* was a way of gaining damages from negligent professional men: an oculist who was said in 1329 to have undertaken (*assumpsit*) to heal a man's sight with herbs and caused him to lose it, or a farrier who was alleged in 1372 to have injured a horse with a nail but not maliciously or *vi et armis*.<sup>250</sup>

The notion of trespasses (*transgressionones*) against the king's peace also added a new dimension to the criminal law. When the eyre 'for all pleas' could not cope with the stream of complaints of trespasses 'by officials and anyone else', responsibility for punishing them had to be given to special commissions of 'oyer and terminer', capped by the occasional, draconian, commissions of trailbaston, and then to the new county justices of the peace.<sup>251</sup> The fourteenth century was a time of continuous judicial experiment for the maintenance of order in the localities amid the disturbance caused by wars in France and Scotland, plague, and demographic crisis. Though at first gradual and hesitant, the raising of the military *custodes pacis* of the mid-thirteenth century to the status of justices, their powers repeatedly extended by parliament and their supervision a major responsibility of the king's ministers, was a vital element in the making of the English state.<sup>252</sup> It was also a demonstration of the enduring potency of the idea of peace in the development of government, which would be shown again in early seventeenth-century Scotland by King James VI's introduction of justices of the peace at a time when he was striving to curb the heritable jurisdictions of the lords, and in 1791 by the revolutionaries' creation of *juges de paix* for every city and canton of France, after the abolition of the franchises of the clergy and nobility.<sup>253</sup>

<sup>248</sup> Baker and Milsom, *Sources of English Legal History: Private Law to 1750*, 338 ff., 552–7. <sup>249</sup> *Ibid.* 506–7.

<sup>250</sup> *Ibid.* 340–2.

<sup>251</sup> EHD iii. 397–8; Harding, *The Law Courts of Medieval England*, 86 ff.

<sup>252</sup> A. J. Musson, *Public Order and Law Enforcement: the Local Administration of Criminal Justice 1294–1330* (Woodbridge, 1996).

<sup>253</sup> For justices of the peace in Scotland, see the introduction to *The Minutes of the Justices*

The justice which the gentry began to administer in late medieval England as the king's agents was recognizably a public criminal justice separate from private vengeance. Prosecution of a wrongdoer's offence against the peace (the *sectam pacis*) was always distinguished from the suit of the persons he injured: the king might pardon the first, but he could not pardon the second.<sup>254</sup> On the other hand the feeling arose that suit by the victims of crime for monetary compensation ought not to bring down on criminals the harsher public punishments as well. William de Prene, carpenter and royal master of works at Roscommon in Ireland, complained in 1292 that he was held in prison on a charge of stealing 60s.-worth of the king's iron nails, an accusation of theft which (he asserted) had been made neither by an appeal of felony nor by the indictment of a presenting jury. The court of king's bench thereupon decided that the action, even though accepted by the Irish justices as 'for the state of the lord king, who has no peer within his lands and whose convenience and rights ought to be protected and regarded by everyone of his lieges', should be regarded as having been brought 'civilly, not criminally', because 'three hundred pounds were laid as damages of the lord king and queen, and for this reason no one ought to be adjudged to the ultimate penalty'.<sup>255</sup> Where there was a writ claiming damages for wrong it obviously originated a civil action: complaints of trespass to the justices of trailbaston and of the peace, who were commissioned to maintain order by punishing malefactors and not empowered to award damages, could be seen as a lesser category of crime, later distinguished from the capital felonies by the name of 'misdemeanour'.<sup>256</sup>

An accusation of crime advanced in King's Bench or before justices of assize, trailbaston, or of the peace, whether a felony (such as murder, rape, robbery, or arson) or what commissions called an 'enormous trespass', became an indictment when it was found 'a true bill' by a presenting jury and endorsed: *ista billa est vera*.<sup>257</sup> Criminal bills were normally prosecuted for the king, but as a matter of public policy complainants continued to be allowed or indeed encouraged in particular cases to sue for the king and for themselves (*tam pro domino rege quam*

*of the Peace for Lanarkshire 1707-1723*, ed. C. A. Malcolm (Edinburgh: Scottish History Society, 3rd ser. xvii, 1931); for the *juges de paix*, see I. Woloch, *The New Regime: Transformations of the French Civic Order, 1789-1820* (New York, 1994), 307-12, 317-20, 350-1, 357.

<sup>254</sup> N. D. Hurnard, *The King's Pardon for Homicide before AD 1307* (Oxford: Clarendon Press, 1969), 16 ff.

<sup>255</sup> *Select Cases in the Court of King's Bench*, ii. 127-34.

<sup>256</sup> *Proceedings before the Justices of the Peace in the Fourteenth and Fifteenth Centuries*, ed. B. H. Putnam (London, 1938), pp. cliv-clviii.

<sup>257</sup> Putnam, *ibid.*, pp. c-cvi, 237 ff.

*pro seipsis*). Private initiative was needed especially to uncover the sorts of official abuse that had been itemized by the articles of the eyre and the corruption of royal ministers, from the chancellor downwards, that had been stigmatized in Edward I's statutes.<sup>258</sup> Laws to protect English money and commercial interests also created misdemeanours from which informers could profit: a person who 'espied' and proved an offence was assured *pour son travail* of a third of the penalty imposed on English merchants for shipping goods in foreign vessels, on alnegers who allowed defective cloth to be sold, and on gilders of metal other than silver (except to embellish the ornaments of holy church); and took a half of the goods confiscated from exporters of corn, victuals, and arms to Scotland. Statutes of the 1420s gave informers third or fourth parts of the goods forfeited by 'trespassers' evading the customs on wool, bypassing the staple port of Calais, or carrying silver out of the realm other than to pay the king's soldiers. An act of Henry VIII in the sixteenth century gave half the penalty for exporting brass or bell metal overseas to 'the party that will sue for the same by writ, bill, plaint or information'.<sup>259</sup>

While the law of treason, as narrowly defined by the Statute of Treasons of 1352, dealt with the personal betrayal of king or bishop, and of a husband by his wife,<sup>260</sup> the category of 'enormous trespasses' embraced a whole range of threats to the order and integrity of the commonwealth. By use of it 'for the conservation of his peace and the quiet of his people' which his coronation oath bound him to, the king attempted to restrain the casual violence of the lords.<sup>261</sup> The more organized violence of overmighty subjects was attacked by statutes such as that of 1390 forbidding lords to grant badges ('signs'), 'fees, robes and other liveries called liveries of company' (effectively uniforms) to anyone except retainers for life and family servants living in the household: offenders against which the Commons asked more than once should be prosecuted by 'indictment or inquest, and by bill or writ' both before royal judges and before local justices proceeding 'in like manner and form . . . as is by your Justices of peace usually used, of trespass done with force and arms against your peace'. The giving of liveries was so dangerous to public order because it went with the 'maintenance' of

<sup>258</sup> *Roll of the Shropshire Eyre*, p. lviii; 'Early trailbaston proceedings from the Lincoln roll of 1305', ed. A. Harding, in *Medieval Legal Records edited in memory of C. A. F. Meekings*, ed. R. F. Hunnisett and J. B. Post (London: HMSO, 1978), 150; Statutes of Westminster I, caps. 24-33, and II, caps. 36, 49, for which see *EHD* iii. 404-6, 449, 457; *Select Cases in the Court of King's Bench*, v. 49; *RP* ii. 167-8 (no. 24), 269b (no. 12), 296 (no. 18).

<sup>259</sup> *SR* i. 270, 372 (c. 3), ii. 18, 34, 164-5, 203, 219, 224, 228, 283, 332, 337, 453, iii. 83.

<sup>260</sup> *Ibid.* i. 319; *EHD* iv. 403.

<sup>261</sup> *RP* i. 355a (no. 7); ii. 165a (no. 6), 305b; iii. 23a, 120, 159a, 265b, 307a, 477-8, 600, 626b, 645a, 662; iv. 14b, 126b, 252a (41-2), 256b, 294a, 333a, 351b, 359a, 410a, 450-1; v. 28a, 108, 111a, 393a, 397a; vi. 184a, 185, 188-9.



the people so retained in their quarrels with their neighbours and the corruption of legal processes by violence and by bribery. The Commons complained in 1406 that despite the statute bannerets, knights and esquires every day gave 'liveries of cloth, one to 300 serving men, one to two hundred, another to a lesser number, another to a greater, to sustain their extortionate quarrels', and that no remedy could be got for the homicides, robberies, rapes of women, and other injuries committed under colour of livery because of the confederacy, alliances, and maintenance among the companies.<sup>262</sup>

The definition of a crime of conspiracy shows best of all the nature of disorder in late medieval England and how the sense of personal wrong merged into a conception of communal harm and public responsibility. Charlemagne had laid down punishments for conspirators, even 'where nothing was put in execution' (*ubi nihil mali perpetratum fuit*), drawing on a tradition of ecclesiastical legislation which set penalties for clerks 'making sworn compacts or conspiring' (*coniurantes aut conspirantes*) against their bishop or superior in religion.<sup>263</sup> But the wrong was first singled out in English law in an instruction to the justices in eyre, within a few months of the order of 1278 to hear *querelae* of trespass from all-comers, to inquire further of 'confederates and conspirators' who bound themselves by oath to support their friends in assizes, jury-trials, and recognitions, and confound their enemies. The temptation to invent or embellish the bill of complaint, and to corrupt the jury which had to pronounce on its worth, was irresistible, and a jury persuaded to swear falsely in a private interest fitted the concept of an illicit conjuration exactly. An ordinance of 1293 provided a writ for use against people who conspired to bring false law-suits and win them by influencing juries, which was followed by a series of cases of 'conspiracy and trespass' in king's bench.<sup>264</sup>

The root meaning of conspiracy in England was thus a concerted subversion of the processes of law, which threatened public order even more fundamentally when it was criminal indictments that complainants, sheriffs, justices, and juries were implicated in falsifying. The corruption of legal and administrative procedures had grown as the procedures grew. In articles added to Magna Carta in 1300, Edward I reached the point of ordering his justices to award inquests without writ to complainants of 'conspirators, false informers, and evil procurers of dozens, assizes, inquests and juries', and anyone was invited to sue for the king against royal ministers suspected of 'maintaining' pleas.<sup>265</sup> The

<sup>262</sup> SR ii. 74-5; EHD 1116-17.

<sup>263</sup> *Capitularia Regum Francorum*, i. 124 (10).

<sup>264</sup> *Select Cases in the Court of King's Bench*, ii, pp. cxli-cxlii, 168, iii, pp. liv-lxxi; RP i. 96.

<sup>265</sup> A. Harding, 'The Origins of the Crime of Conspiracy', *TRHS*, 5th ser. 33 (1983), 94-7; *Select Cases in the Court of King's Bench*, i. 76; SR 139; EHD iii. 499 (cc. 9, 10).

sheriff of Northampton was accused in 1302 of making 'a confederacy with several others of the county', a group 'afterwards called "the company of the pouch"', that 'some of them would indict persons, and the others save them, for bribes, according as the same sheriff would arrange the panels [of jurymen]'.<sup>266</sup> In 1305 the first justices of trailbaston were instructed to try felonies committed back to 1297 with the normal severity while hearing indictments of 'light and personal trespasses' at the suit of the aggrieved persons and binding the trespassers over to behave peacefully thenceforward. Between these two extremes, the enormous trespasses of all those found guilty before them of 'beating, wounding and maltreating many in the realm placed on juries, recognitions and assizes because they told the truth' and of assaulting others 'in fairs, markets and other places of common resort [*locis communibus*] out of enmity, envy and malice aforethought', they were to investigate especially, at the king's suit whether or not a private complainant sued. They were to punish also those found to have hired such trespassers, and those who used their power and lordship to take people under their protection and advocacy for money' (i.e. run protection rackets).<sup>267</sup>

The trailbaston justices quickly discovered that their own inquiries were obstructed 'by the procurement and alliances of the people of the country', who concealed all 'great matters from them'. The response to the Yorkshire justices' complaint to the king that their commission ('of which we send you a copy') did not cover such conspiracies was the first definition of a crime by parliamentary ordinance: conspirators were said to be those who bound themselves by agreement 'falsely and maliciously to indict or acquit men' and 'such as retain men in the country with liveries or fees to maintain their malicious enterprises'.<sup>268</sup> But parliament vacillated in the later middle ages between condemnation of conspirators and anxiety lest honest men should be taken as such when they were only trying to do their duty, for it was quickly realized that the threat of an accusation of conspiracy was the best way to coerce a jury. The parliament of 1393 was still complaining of evil-doers indicted by honest men and then acquitted by corrupt trial juries, who promptly brought writs of conspiracy against their indictors in foreign counties: if jurymen were frightened from telling the truth, it would be to the 'very great destruction of the enforcement of the law of the realm'.<sup>269</sup>

<sup>266</sup> *Britton*, 2 vols, ed. and tr. F. M. Nichols (Oxford: Clarendon Press, 1865), i. 95 n.

<sup>267</sup> Harding, 'Early trailbaston proceedings', 144–5; H. M. Cam, *Studies in the Hundred Rolls*, Oxford Studies in Social and Legal History, ed. P. Vinogradoff, 6 (1921), 73–9; 95; *RP* i. 178.

<sup>268</sup> *RP* i. 183b; *SR* i. 216; *EHD* iii. 519–22; Harding, 'Early trailbaston proceedings', 148–9, 164; id., 'The Origins of the Crime of Conspiracy', 98–9.

<sup>269</sup> *RP* i. 289a, 299a, 371 (no. 5), ii. 11a, 65a, 137a, 166, 259b, iii. 42–3, 83b, 306a;

Conspiracy was the first crime to be defined in parliament because it perverted the means of communication between the people and their king by bills of complaint and the whole system of justice they supported. A world of local chieftains ruling by force and patronage, and in the west and north of England possessing their own 'serjeants of the peace', was not easily changed into one of justices exercising an acknowledged and responsible public authority: the landlords' use of judicial commissions as a weapon in local disputes was at the heart of the 'lack of governance' in late medieval England.<sup>270</sup> Yet a measure of public order was imposed on the mass of the people by the repeated renewal at the instance of the Commons of a group of statutes 'for tranquillity, peace and quiet within the realm': the Statutes of Winchester (1285) and Northampton (1328) which were the foundation of the authority of the JPs, and others concerning livery and maintenance, weights and measures, and servants, labourers, and vagabonds.<sup>271</sup> Parliaments were often said to be summoned to discuss how the peace should be preserved in every place, and at them prelates, lords temporal, and commons might take a solemn oath 'to guard the good peace, quiet and tranquillity in the realm', the churchmen at the same time pronouncing a sentence of excommunication on all who broke it.<sup>272</sup> Main functions of the king's council were to supervise the local justices and, sitting in Star Chamber, to punish 'great riots and unlawful assemblies' beyond the JPs' power to suppress—acting once again on bills of complaint and using its ability to order the imprisonment and imposition of huge fines on any in the land 'as their estates and the quantity of their trespass' demanded.<sup>273</sup>

The category of 'conspiracy' and 'confederacy' was extended from the subversion of legal processes to the political machinations of town oligarchies and the commercial chicanery of merchants and gildsmen, and then to the 'alliances and covins . . . congregations, chapters and ordinances' of villeins challenging their conditions of tenure and workmen who resisted the labour laws, and 'the oaths taken between them or to be taken in the future'. In 1425 the Commons petitioned against 'the chapters and assemblies' of masons in contravention of the Statute

*Proceedings before the Justices of the Peace in the Fourteenth and Fifteenth Centuries*, ed. Putnam, 69, 72, 74, 79, 386, 408, 478–9, for a variety of cases of conspiracy heard by the JPs themselves.

<sup>270</sup> R. Stewart-Brown, *The Serjeants of the Peace in Medieval England and Wales* (Manchester UP, 1936); Harding, *Law Courts of Medieval England*, 90 ff.

<sup>271</sup> SR i. 276–8, 364–5, 374, ii. 509; RP ii. 166b (no. 14), 257–8, 271b (no. 28); iii. 23 (92), 42–3, 82 (36), 158 (29), 268–9 (38); vi. 8, 198b (10); EHD iii. 460–2; EHD iv. 533 ff.

<sup>272</sup> RP ii. 64b, 103a, 158a, 200a, 225b, 237a; iii. 71a, 99b, 252a (48), 284a, 300a, 309a, iv. 15b, 106b, 150a, 169b, 197b, 495b.

<sup>273</sup> Harding, *The Law Courts of Medieval England*, 105–6.

of Labourers, and the JPs were now empowered to treat as felons at least those who called such assemblies, but only to imprison those who attended the meetings until they made 'fine and ransom, at the will of the king'.<sup>274</sup> In 1824 when combinations of workmen were at last exempted from proscription as conspiracies, thirty-three English, Irish, and Scottish acts had to be repealed, of which the second was this statute of 1425, the first the ordinance of 1305 'entitled *Who be conspirators and who be champertors*' in so far as it related 'to combinations or conspiracies of masters, manufacturers or other persons, to lower or fix the rate of wages' (which, of course, it had not done at all).<sup>275</sup>

The statutory enforcement of what could still be called in Elizabeth's reign 'God's peace and the Queen's' was extended in the sixteenth century to the suppression of other sorts of covins and conjurations of the people which in the middle ages had been the concern of the Church. In France the first witchcraft ordinance of 1490 ordered civil magistrates to be diligent in hunting out and handing over to their bishops 'enchanters, diviners, invokers of evil spirits, magicians and all others using wicked arts and knowledge forbidden by the church'.<sup>276</sup> By comparison the first English witchcraft law (cap. 8 of a statute of 1542) made felons at common law of persons who 'devised and practised invocations and conjurations of spirits, pretending by such means to understand and get knowledge for their own lucre in what place treasure of gold and silver should or might be found or had in the earth or other secret places, and also have used and occupied witchcrafts, enchantments and sorceries to the destruction of their neighbours' persons or goods' or 'to provoke any person to unlawful love'. Such 'fantastical practises' were to be prosecuted in the king's courts, because they were committed to the 'hurt and damage of the king's subjects' and 'disquietness of the realm'—though as felonies rather than trespasses perhaps because they were also 'to the great dishonour of God' and 'the loss of the souls of such offenders'. The chapters preceding and succeeding this one give half of a monetary penalty to the party who prosecuted ('by bill, plaint or information') anyone conveying brass, latten, or bell metal over the sea, and prohibit 'unlawful games' detracting from 'the maintenance of artillery'. In England the prosecution of witchcraft found a place in the law of economic misdemeanours and of

<sup>274</sup> Harding, 'The Revolt against the Justices', 191–3; id., 'The Origins of the Crime of Conspiracy', 98, 103–8; *The Eyre of London*, ed. H. M. Cam, Selden Soc. 85 (London, 1968), pp. xxv, cxi–cxiii, 16, 27, 40–2, 44–53; *RP* i. 202a (no. 66), 216b, 286a, 370b; ii. 265b, 350b, 374–5; iii. 142a, 331a; iv. 75a, 292a.

<sup>275</sup> 5 Geo. 4, c. 95.

<sup>276</sup> *Ordonnances des Roys de France*, xx. 252–3.

personal injuries (where it focused on the secret ways of harming credited to women), well before the rooting out of pacts with the devil became part of the ideology of the Protestant state.<sup>277</sup>

<sup>277</sup> *SR* iii. 837; cf. *EHD* iv. 720 (xxvii), for a case before the commissary of the bishop of London in 1481 in which Joanna Beverley *alias* Cowcross was accused of working together with two 'accomplice witches' to make two gentlemen of Gray's Inn commit adultery with her; Keith Thomas, *Religion and the Decline of Magic*, 2nd edn. (Harmondsworth, 1973), 32, 60, 276, 278–82, 292 for the uncovering of buried treasure and the new meaning of 'conjunction'.

## CHAPTER EIGHT

# The Monarchical State of the Later Middle Ages

IN THE later middle ages the two principal meanings of *status* which had crystallized in the legal systems of France and England—on the one hand the condition, peaceful or troubled and in need of legislative reform, of the whole realm or commonwealth, on the other hand the legal standing of the classes of persons who made it up, culminating in ‘the state of the king’—began to coalesce into a political theory of the monarchical state. Very much the king’s instrument in a violent world, the *status regis et regni* was tempered to a new strength in the Anglo-French war, but it was more than simply the power to tax and deploy armies. Rather, the monarchical state was what made taxing and military adventures possible: the administrative offices and procedures, and the very sense of the kingdom as a political entity, which had grown from the king’s exercise of his first duty to give laws and justice to his people. Extended to this *état monarchique*, the Aristotelian analysis of constitutions acquired a new depth.

### ‘THE STATE OF THE REALM’ AND POLITICAL CONTINUITY

It was the idea of the *status regni*, not of the nation, that had allowed rulers and their ministers to come to an understanding of a country as a continuous and a continually reformable entity, while theorists remained attached to the classical term *civitas* (‘city’) and pursued the ideal of a ‘perfect community’ (*communitas perfecta*). Kings had never been so idealistic: they sought stability rather than perfection in their realms, and even when *stabilitas* became *status*, it long retained a conservative, immobile quality. Yet the activity of legislation carried forward a people united in what Aquinas termed ‘political communion’, under the guidance of *prudentia*, the virtue necessary for ‘the rule of a multitude’ and ‘ordained for the common good of the city or realm’. The first element of prudence was memory, because it dealt with contingent events, not necessary truths, and looked to remembered

experience to provide 'good council concerning future things [*de futuris*]'. (Reaching purposefully into the future, Aquinas's body politic seems to inhabit the *aevum*, which is poised between timeless eternity and the accidents of time, along with the angels, and with the ruler himself in his public role.)<sup>1</sup>

Though he knew the teaching of the classical writers that memory was a store of images in the mind's eye, to be preserved by a hard-learned mental discipline, Aquinas appreciated the value of written record as an aid to memory, giving the example of official lists of soldiers or counsellors.<sup>2</sup> But political memory was preserved best of all in the *acta* and *établissements* of rulers. Just as collections of charters were the memories of the great landed families, Frankish and Anglo-Saxon law-codes registered the histories of kingdoms as more than a bare succession of events. By the later middle ages statutes and plea-rolls embodied a mass of experience with the aid of which the procedures of government might be continually reformed and developed, experience which became more accessible and compelling as the record moved from Latin into the vernacular languages.<sup>3</sup>

Adherence to the simplicities of a 'good old law' enshrined in unwritten custom ceased to be a practical ideal with the growth of territorially extensive kingdoms under ambitious rulers.<sup>4</sup> Aquinas's pupil Giles of Rome (Aegidius Romanus), writing for the future King Philip IV the most widely read of the medieval treatises 'On the government of princes' (*De regimine principum*), distinguished between 'cities' and 'kingdoms' in terms of self-sufficiency. No city, in its everyday sense, could be a *communitas perfecta* on its own, for none could contain all the arts, those of the smith, the weaver, the corn-merchant, the vintner, and the rest. Human life required men to establish the *communitas regni*, which brought together the resources of a number of cities.

<sup>1</sup> Aquinas, *Summa Theologica* [ST], I [*Prima Pars*], quaestiones 77, art. 8 ad 4, 78 art. 4, conc., 79, art. 6–7, 89, art. 6 ad 1, 93, art. 1 ad 3 and art. 7 ad 3; ST I–II [*Prima Secundae*], qq. 50, art. 3 ad 3, 51, art. 3, conc., 57, art. 4 ad 3, 90, art. 2, conc., art. 3 ad 3; ST II–II [*Secunda Secundae*], q. 49; Frances A. Yates, *The Art of Memory* (London, 1966), ch. 3; for the *aevum* see: ST I, q. 10; E. H. Kantorowicz, *The King's Two Bodies* (Princeton UP, 1957), 275–84; and F. Kermode, *The Sense of an Ending* (Oxford UP, 1966), 72 ff.

<sup>2</sup> ST I, q. 24, art. 1, conc.

<sup>3</sup> P. J. Geary, 'Land, Language and Memory in Europe, 700–1100', *TRHS*, 6th ser. 9 (1999), 171; P. Wormald, *The Making of English Law: King Alfred to the Twelfth Century*, i. *Legislation and its Limits* (Oxford: Blackwell, 1999), 45 ff., 416 ff.; cf. Sarah Foot, 'Remembering, Forgetting and Inventing: Attitudes to the Past in England at the End of the First Viking Age', *TRHS*, 6th ser. 9 (1999), for the 'invention' of 'public memory'; see also J. Hudson, 'Administration, Family and Perceptions of the Past in Late Twelfth-Century England: Richard FitzNigel and the Dialogue of the Exchequer', in *The Perception of the Past in Twelfth-Century Europe*, ed. P. Magdalino (London, 1992), for the grasp of pre-Conquest history through the Anglo-Saxon laws.

<sup>4</sup> M. T. Clanchy, 'Remembering the Past and the Good Old Law', *History*, 55 (1970).

A kingdom had to have a considerable population and geographical size and needed a more complex machinery of government.<sup>5</sup> Conferring the imperial title on Charles IV in 1346, Pope Clement VI lauded that *status sacri imperii* not only as the last of the four empires prefigured in the Old Testament, but also as a 'state' which was of great extent spatially (*spatiose dilatatus*). In Clement's eyes the principality of the 'lord of the world' was not universal, however, for canon law showed a previous pope annulling the Emperor Henry VII's judicial proceedings against the King of Sicily for conspiring against him only outside the empire's historical boundaries. Kingdoms were the political realities.<sup>6</sup>

The *status regni*, no less than the *status ecclesiae*, was a complex institution which existed to be constantly reformed, and the notion of reform gradually changed from the restoration of an ancient and customary state of things to constant improvement by written laws to meet the new 'necessities' of rulers and peoples. In the acts of the emperors of the twelfth and thirteenth centuries the meaning of *reformatio* was extended from the simple restoration of the property rights of particular churches to law-making for the peace and prosperity of the whole *status regni* or *status imperii*.<sup>7</sup> Rudolf of Habsburg worked hard for 'the reform of the collapsed state (*collapsi status*) of the empire' and of 'the peaceful state of the land'.<sup>8</sup> Even without political crisis, law needed changing *pro reformatione sacri imperii et pro regimine totius respublicae*. As a privilege of Charles IV put it in 1348, laws which were theoretically profitable were often found not so by experience; human statutes required to be 'reformed with new sanctions' and new antidotes provided for newly emerging problems.<sup>9</sup> Gratian's *Decretum* and secular law-books like Eike von Repgow's or Bracton's or Beaumanoir's were attempts to incorporate the results of the first surge of reforming legislation into comprehensive accounts of their countries' laws and customs.<sup>10</sup> Vivid illuminations in manuscripts of the *Decretum* and the *Sachsenspiegel* obeyed the ancient writers' dictum that memory even of

<sup>5</sup> Aegidius Romanus, *De regimine principum Libri III* (Rome 1556: repr. Frankfurt, 1968), 243–5 (book 3, pt. 1, c. v); cf. *The Defensor Pacis* of Marsilius of Padua, ed. C. W. Previté-Orton (Cambridge UP, 1928), 7 (*Dictio* 1, c. 2).

<sup>6</sup> *Constitutiones et Acta Publica Imperatorum et Regum*, 1345–1348, 143–51; *Corpus Juris Canonici, Clementinarum*, lib. II, t. xi (ii).

<sup>7</sup> *Friderici I Diplomata* 1158–1167, 85.41, 93.13, 134.5, 146.35, 153.16, 308.6, 396.28, 408.24; *Friderici I Diplomata* 1181–1190, 199.35.

<sup>8</sup> *Constitutiones*, 1273–98, 28.5, 50.9 and 28, 51, 52.5.

<sup>9</sup> *Constitutiones*, 1325–30, 347.20, 690.35, 719.1; *Constitutiones*, 1345–48, 94.10, 607.10, and cf. 11.20, 27.20, 63.20, 64.1, 116.10, 215.25, 304.10, 310.45, 435.20, 509.40, 564.25, 703.1.

<sup>10</sup> P. Brand, 'The Age of Bracton', in *The History of English Law*, ed. J. Hudson (Oxford UP for the British Academy, 1996); J.-Ph. Genet, 'Droit et histoire en Angleterre', *Annales de Bretagne* (1980).



the legal norms of church and kingdom could be best preserved in pictures.<sup>11</sup>

Legislation to 'reform the state of the realm for the better' (*statum regni in melius*) provided political continuity most obviously in France and England, where the fourteenth-century crises of war, plague, and social unrest made it the subject of anxious debate in the meetings of estates and parliaments. Louis IX's comprehensive reform of French administration in the *Grande Ordonnance* of 1254 had been followed in Philip IV's *Magna Statuta* of 1303, itself confirmed by later ordinances.<sup>12</sup> These continued to be accompanied by the appointment of *enquêteurs-réformateurs* to deal with grievances in the localities.<sup>13</sup> But when the 'les trois estas du royaume de France, de la langue de oil', clergy, nobles, and *bonnes villes*, were summoned in 1356, in the aftermath of King John's defeat and capture at Poitiers, to give council 'on things touching the honour, profit and *estat* of the realm', the deliverance of the king and the provision of an aid for the 'necessities of the kingdom', these deputies brought up to Paris complaints of 'the defects [*deffaulx*] which have been in the kingdom of France', in the administration of justice, in 'the government of the estate of the prince' and of his household, in the conduct of the war, in the management of the king's finances, and in the appointment of councillors and officials. They dared no longer stay silent, they said, about the behaviour of the *baillis*, captains of *pays*, tax-collectors, and others, who obtained their offices by bribery and friendship and could have nothing proved against them because of their mutual alliances; or about the delays faced by nobles and *bourgeois* who appealed to the king's court and went away after a fortnight, three weeks, a month, or more, without an answer and so impoverished and disgruntled that some who had been French became English. For the sake of the body politic (*chose publique*), and in return for the grant of an aid, it was necessary to establish 'good and stable moneys', to reform 'l'estat de toutes les chambres des comptes', to appoint tax-collectors who would have regard to the *utilité publique* and see that in future aids were spent on the purposes they were given for. The subsequent ordinances answered the grievances of the estates in the terms of a century-long experience of 'reforming' legislation.<sup>14</sup>

<sup>11</sup> A. Melnikas, *The Corpus of the Miniatures in the Manuscripts of the Decretum Gratiani*, *Studia Gratiana*, 16–18 (Rome, 1975), i. 115–31, for images of simony; W. Koschorreck, *Der Sachsenspiegel in Bildern* (Frankfurt, 1976), 54–9, for representations of the protected status of clerics and Jews under *Landfriede*.

<sup>12</sup> *Ordonnances des Roys de France*, ii. 450, iii. 2, 121–53, 223, 647, iv. 214–16; F. Olivier-Martin, *Histoire du droit français*, 2nd edn. (Montchrestien, 1951), 352–6.

<sup>13</sup> J. R. Strayer, *The Reign of Philip the Fair* (Princeton UP, 1980), 387, 414.

<sup>14</sup> R. Delachenal, 'Journal des États Généraux réunis à Paris au mois d'octobre 1356', *Nouvelle Revue Historique de Droit Français et Étranger*, 24 (1900), 415–65; R. Cazelles, *Société politique, noblesse et couronne sous Jean le Bon et Charles V* (Paris, 1982), 28–30,

Twenty years later the pressures of the same Anglo-French war provoked the 'Good Parliament' in England to make similar criticisms. In 1376 Sir Peter de la Mare, the first known 'speaker' for the Commons, rehearsed before the lords the many faults they found in the ordering of *lestate* of the king and the realm, putting first the separation of the staple for the wool trade among a number of English ports, at which Lord Latimer and Richard Lyons, a London citizen, were profiting hugely from grants of the customs duties. Lord Latimer said that the removal of the staple from Calais had been the decision of the king and his council, but 'Sir Peter replied that "this was against the law of England and against the statute made in parliament, and what was done in parliament by statute could never be unmade without parliament" . . . And the said Sir Peter had a book of statutes by him and opened the book and read the statute before all the lords and commons so that it could not be denied.'<sup>15</sup>

The binding force of statute law had been asserted in England since at least the beginning of the century. A new clause was introduced into the coronation oath when Edward II was crowned in 1308: the king was asked to swear not only to confirm the laws made by his predecessors, but also 'to maintain and keep the laws and rightful customs which the community of your realm shall choose, and defend and enforce them to the honour of God, to the best of your ability'.<sup>16</sup> In 1322 Edward was able to erase the Ordinances imposed on him by a faction of the magnates in 1311, by declaring the 'custom' that things that were 'to be established for *lestat*' of the king and his heirs, and for '*lestat* of the realm and the people', should be 'treated, accorded [and] established, in parliaments', by the assent of the prelates, earls, and barons and 'the community of the realm'.<sup>17</sup> If the custom was imaginary, the growth of confidence on the part of the Commons in petitioning for legislation on matters affecting justice and trade was real. Though Edward III quickly revoked and ordered to 'lose the name of statute' an ordinance he had conceded in the political crisis of 1341, as 'prejudicial and contrary to the laws and usages of the realm, and the rights and prerogatives of the king' (it called for the appointment and swearing in of ministers in parliament), he was careful to say that clauses in it which accorded with 'law and reason' would be reenacted in a new statute by the advice of the

229 ff.; J. Krynen, *L'Empire du roi: Idées et croyances politiques en France XIII-XV siècle* (Paris 1993), 196 ff., 419-32.

<sup>15</sup> *The Anonimale Chronicle 1333-1381*, ed. V. H. Galbraith (Manchester UP, 1927), 80-6; G. Holmes, *The Good Parliament* (Oxford: Clarendon Press, 1975).

<sup>16</sup> *Select Documents of English Constitutional History 1307-1485*, ed. S. B. Chrimes and A. L. Brown (London, 1961), 4-5; H. G. Richardson, 'The English Coronation Oath', *Speculum*, 24 (1949).

<sup>17</sup> SR i. 189-90; *Select Documents*, ed. Chrimes and Brown, 31-2; *EHD* iii. 543-4.

judges.<sup>18</sup> In 1355 the whole corps of judges of king's bench and common pleas, barons of the exchequer and the king's serjeants-at-law advised that a statute then under discussion could not be changed except in parliament.<sup>19</sup> An apparent attempt in 1377 to drop from Richard II's coronation oath the clause to uphold the laws which the people would 'justly and reasonably choose' did not succeed, and legislation in Richard's parliaments regularly began with confirmations of 'the common law, and also the special laws, statutes and ordinances of the land made before this time, for the common profit and good governance of the realm'.<sup>20</sup> The need to periodically reissue statutes was not (as is often said) a token of their ineffectiveness but of the fact that they registered the political experience of the commonwealth and were the permanent underpinning of its structure.

'THE STATE OF THE KING' AND GOVERNMENT FOR  
THE COMMON GOOD

The resolution to preserve 'the state of the realm' belonged to lawyers and politicians: theorists talked for the most part of the pursuit of the 'common good', or the 'public good', or else of the best 'policy'. (*Politeia* was the Aristotelian term for any constitution, and sometimes for the ideal constitution in which the people as a whole ruled in the interests of everyone, as opposed to *democratia* in which the masses ruled in their own interest.) *Status* was used by political commentators primarily of the standing of individuals and groups of persons, the great issues of politics being seen as the establishment of the best of regimes and the definition of 'the estate of the king' (*status regis*, *status regalis*, 'estate royal') in its relation to the other estates, especially in the making of laws in parliament or estates-general.<sup>21</sup>

The crucial work of Aquinas and his circle in distilling from Aristotle's *Politics* a set of precepts for *The Rule of Princes* reflected the thirteenth-century acceleration of governmental activity. Aquinas's *De regno* (on 'how the name of king should be understood'), a work addressed to 'the king of Cyprus' which stands at the beginning of the *De regimine principum* completed by his pupil Ptolemy of Lucca,

<sup>18</sup> W. M. Ormrod, 'Agenda for Legislation, 1322-c.1340', *EHR* 106 (1990); *RP* ii. 139 (23), 253 (42), 254 (1), 257 (16); *SR* i. 295-7; *Select Documents*, ed. Chrimes and Brown, 64-7.

<sup>19</sup> *Select Documents*, 81-2.

<sup>20</sup> *RP* iii. 6 (20); *SR* ii. 1, 17; N. Saul, *Richard II* (New Haven and London: Yale UP, 1997), 25-6.

<sup>21</sup> M. S. Kempshall, *The Common Good in Late Medieval Political Thought* (Oxford: Clarendon Press, 1999); for the use of *status regalis* in the later middle ages, see W. Mager, *Zur Entstehung des modernen Staatsbegriffe* (Wiesbaden, 1968), 41-82.

justified monarchy in metaphysical and moral terms which retained their resonance for centuries.<sup>22</sup> A seventeenth-century English royalist turned Aquinas's arguments into a ballad: monarchy was the soul of the country and 'the Image of that Domination | By which Jehovah rules the whole Creation'; it was therefore a regime found throughout nature, so that 'Poor Cranes, and silly Bees . . . obey their Kings' (kings, not queens, in both Aquinas and the ballad). Above all, 'A Monarchy's that Politick simple State | Consists in Unity' and 'makes one body of a multitude'.<sup>23</sup> Aquinas maintained that a king alone could provide for each person 'according to his character and estate' (*constitutionem et statum*), and then preserve 'the unity which is called peace' of that 'multitude' in which men needed to live for a good life. By experience kingship was found preferable to aristocratic rule as aristocratic rule was better than a polity in which power was dispersed between aristocrats and people. Certainly men became more concerned for the common welfare when, like the ancient Romans, they drove out tyrannical kings who pursued only their own profit, but Aquinas went so far as to distinguish between degrees of tyranny and praise the governmental effectiveness of moderate tyrants. (In this, he stands somewhere between John of Salisbury, whose *Policraticus* in the 1150s had somewhat tentatively justified the killing of 'public tyrants', and Machiavelli with his amoral justification of whatever would win and hold a state.<sup>24</sup>)

Aquinas's followers moved discussion on from the threefold typology of constitutions to a distinction which was vital for their own times (though it also originated with Aristotle) between pure *regimen regale* ('kingly rule') and *regimen politicum* (political rule), the latter concept derived from the idea of a 'mixed polity' which combined the best aspects of monarchy, aristocracy, and popular government.<sup>25</sup> Ptolemy of Lucca provided the most radical picture of political rule. A church historian whose exaltation of the authority of the Roman pope over the German emperor was combined with enthusiasm for Rome's republican

<sup>22</sup> *The Politics of Aristotle*, tr. E. Barker (Oxford: Clarendon Press, 1946), 87, 114, 174–8, 183; *De regimine principum* can be found in *S. Thomae Aquinatis Opuscula Omnia*, i, ed. J. Perrier (Paris, 1949), and Book I of the work, the only part agreed to be by Aquinas himself, ed. A. P. D'Entreves and tr. J. G. Dawson, in *Aquinas: Selected Political Writings* (Oxford, 1965); on Aquinas's place in the tradition of thought about government, see M. Senellart, *Les Arts de gouverner: du regimen médiéval au concept de gouvernement* (Paris, 1995), 155–76.

<sup>23</sup> *Aquinas: Selected Political Writings*, 12, 50, 66–71; W. H. Greenleaf, 'The Thomasian Tradition and the Theory of Absolute Monarchy', *EHR* 79 (1964), 752.

<sup>24</sup> *Aquinas: Selected Political Writings*, 14, 20, 24–35; John of Salisbury, *Policraticus*, ed. and tr. C. J. Nederman (Cambridge UP, 1990), bk. VIII, cap. 20.

<sup>25</sup> *The Politics of Aristotle*, tr. Barker, 60, 104–5, 111–12; Aquinas, *Summa Theologica*, I–II, q. 95, art. 4, conc., for the mixed constitution; N. Rubinstein, 'The History of the Word *politicus* in Early-Modern Europe', in *The Languages of Political Theory in Early-Modern Europe*, ed. A. Pagden (Cambridge UP, 1987).

greatness, he composed around the year 1300 the last four fifths of the treatise *De regimine principum* which was ascribed as a whole to Aquinas and enjoyed the latter's enormous authority. Book 2 of the work, the first by Ptolemy, develops the theme of the founding of cities. To do it successfully a ruler needs natural wealth—woods, vineyards, and flocks—but also artificial wealth in the form of a well-filled treasury and a gold and silver coinage to fuel the economy. Money assures against future necessity for everyone. In this respect in particular Ptolemy sees the royal state (*status regalis*) as having a universal quality (*quamdam universalitatem*) which is 'common to all the people subject to it'. 'The state of lords' is by its nature communicable (*communicativus*) to those under them—both its strength and mode of operation—but this cannot happen without a stable coinage, weights and measures, and safe roads, just as a smith or carpenter cannot work without instruments (bk. 2, caps. 7, 12–14). The king and every other lord should take care for 'the conservation of his state' by maintaining the poor from the public purse (cap. 15).<sup>26</sup>

The state of the ruler thus merges with, and begins to absorb, the state of the community he rules. Ptolemy differs from Aquinas as to what is the best *status regiminis* for the people. The final and most essential requirement for successful government is a corps of officials, and what decides whether the regime is 'political' or 'despotic' is whether these act as free men or slaves. *Regimen regale* often comes into the category of the despotic (bk. 2, caps. 8–10). Ptolemy thinks a political regime best answers 'the common necessity of human life' to constitute a *civitas*, and that it already existed in the *status innocentiae*, 'the wholesome state of human nature' (*status integer humanae naturae*) before the fall (bk. 2, cap. 9; bk. 4, cap. 2). The faults of the Jews showed why despotic kingship was introduced, and was indeed necessary for most peoples, both ancient and modern (bk. 3, caps. 7–8), but the republic of the ancient Romans was a much better historical model of good government. Combining sacred and secular history Ptolemy's book 3 traces the exercise of power from God's granting of dominion to the ancient Romans because of their 'most holy laws and civil goodwill' (*leges sanctissimas et civilem benevolentiam*) to the establishment of the principate of Augustus, which was ordained to make way for the monarchy of Christ, the fifth and final monarchy after the Assyrian, Persian, Greek, and Roman empires.<sup>27</sup>

<sup>26</sup> Ptolemy of Lucca's continuation of the *De regimine principum*, in *S. Thomae Aquinatis Opuscula Omnia*, 270–426; Q. Skinner, *The Foundations of Modern Political Thought*, 2 vols. (Cambridge UP, 1978), i. 52–5; C. T. Davis, 'Roman Patriotism and Republican Propaganda: Ptolemy of Lucca and Pope Nicholas III', *Speculum*, 50 (1975); J. M. Blythe, *Ideal Government and the Mixed Constitution in the Middle Ages* (Princeton UP, 1992), cap. 6.

<sup>27</sup> Cf. Blythe, *Ideal Government*, 100.

While awaiting the perfection of Christ's rule, the commonwealth (*respublica*) had continued to grow 'on the example of the ancient Romans', but tended by emperors who had come to accept the pope as the vicar of Christ and the papacy's 'fullness of power' as exercised for the sake of 'the good state of the universal church'. The fortunes of the empire and its obedience to the Church are traced by Ptolemy through Charlemagne to the reign of Otto III, and book 3 ends with the observation that imperial rule is political as well as regal, in that the emperor is not hereditary but elected to an office; and with a survey of the lords found under both kings and emperors who rule with 'some state of dignity': counts, dukes, margraves (a name alleged to derive from the severity of their justice), barons and castellans, and other *majores statu* like the magistrates of the French king's court (caps. 12, 20–2). In his final book Ptolemy turns to a fuller analysis of political rule and its difference from 'the principality of a kingdom'. Some provinces were naturally servile and fit just for despotic kingship: people of strong minds, brave hearts, and confident intelligence could be ruled only *principatu politico*, which was usually aristocratic in nature. The perfect polity and *felicitas politica* was achieved when a diversity of offices was spread among citizens according to merit, as among the ancient Romans; when the *rectores politici* took counsel (as the pope did from the cardinals) and exercised justice within the letter of a written law made by a senate; and when the 'parts' of the polity—the farmers, warriors, and officials—were arranged to work in harmony, like the heart, brain, and other organs of the body, or the voices of a choir. As a building was stable when its parts were well-set, so a polity had 'lasting strength of state' (*perpetua firmitas status*), when everyone kept to his estate or degree and performed his public duty as rector, official, or subject (bk. 4, caps. 1, 23–8).<sup>28</sup>

Other Italian schoolmen made use of the Aristotelian discussion of regimes from different political viewpoints, naturally coming to different conclusions as to which form of government was best, but all of them seeing that any successful rule required political transactions between status-groups. In 1324 Marsilius of Padua, a partisan of the emperor Lewis of Bavaria in his conflict with the papacy, completed his *Defensor Pacis* ('Defender of the Peace'), a work which has been described as 'reverberating down the centuries', because it blamed 'the civil discord and intranquillity in certain kingdoms and communities' on the pursuit by 'the bishop of Rome and his clerical coterie' of plenitude of power and temporal wealth, and for the first time argued for the subjection of churchmen to temporal government. (Marsilius finds a

<sup>28</sup> Cf. Blythe, *Ideal Government*, 97, 111–15.

priestly class necessary to 'the state of this world' (*huius saeculi statu*) not politically but because of its cultivation of those virtues and correction of those vices which 'the legislator cannot regulate by human law'.) To defend the peace against ecclesiastical interference there needs to be a further and strong 'governing part' at the head of the polity. Yet it is notable that the regime Marsilius recommends (and seems to present as the pattern of the empire) is a political one, for his *pars principans* is elected and rules by the consent of the 'legislator' which is the whole community speaking through its 'weightier part'.<sup>29</sup>

Ptolemy of Lucca and the leading jurist, Bartolus of Sassoferrato,<sup>30</sup> in his *De regimine civitatis*, seem clear that the political interchange of a city-state would not work among large multitudes, and it is significant that the most continuous discussion of *regimen regale* is found among writers in the great kingdom of France: their bias to this form is surely a reflection of the actual strength of the French monarchy as much as the conclusion of an autonomous tradition of political thought. The kingdom of France was marked by its stream of royal legislation, and the question for Aristotelians was whether these laws could properly be made by the king's will alone or needed the consent of the community. Were the royal will and reason sufficient justification for the laws which Aquinas knew that kings must make for the development of their communities, or did they need popular consent? He seems to have believed that the best form of human law was the *lex* made by the king with the consent of aristocrats and plebs together, but he taught that a ruler must certainly have unfettered power to dispense from human law in case of necessity. Was it perhaps better to be ruled by the will of the best king than by the best laws? These were questions which must have had a peculiar resonance in France, particularly at the time of Philip IV's uncompromising claim to defend 'the needs of the church and ecclesiastical persons and the peaceful state of the whole kingdom of France' against the bulls of Pope Boniface VIII.<sup>31</sup>

Giles of Rome, who wrote for the future Philip IV the earliest and apparently most read of the treatises *De regimine principum*, opts for the best king precisely because he can will the best laws, if he is properly educated and duly consults his councillors. Giles recognized

<sup>29</sup> Marsilius of Padua, *The Defensor Pacis*, ed. Previt -Orton, esp. 19, 64-74, 492; cf. *Marsilius of Padua: The Defender of the Peace*, tr. with an introduction by A. Gewirth (New York: Columbia UP, 1956), discourse I, caps. 5, 15, 19, and discourse III; Blythe, *Ideal Government*, 161, 170-1, 193-201.

<sup>30</sup> On Bartolus see now M. Ryan, 'Bartolus of Sassoferrato and Free Cities', *TRHS*, 6th ser. 10 (2000).

<sup>31</sup> Blythe, *Ideal Government*, 43, 108; Aquinas, *ST* I, q. 81, a.3 ad 2, I-II, q. 97; the *De regno*, ed. and tr. D'Entreves and Dawson, 80-3; J. H. Denton, 'Philip the Fair and the Ecclesiastical Assemblies of 1294-1295', *TAmPhilSoc*, 81, part 1 (1991), 35, 38, 67, 70, 74.

the attractions of a political community (*communitas politica*), such as he thought was commonly found in an Italian city, in which the people elected their *podestà* and made laws for the good of everyone 'according to his state' (*secundum suum statum*), yet experience showed a *collection* of cities and provinces to need a king if they were to enjoy abundance and be free of dissension and war. Giles was made archbishop of Bourges by Pope Boniface VIII and became a strong papalist;<sup>32</sup> Peter of Auvergne was made bishop of Clermont by Boniface but joined with John of Paris, another university Thomist, in support of King Philip. Peter, like Giles, believed in the need for a strong king able to override the rigidity of legal norms, but also that he must rule under the regulation of his will and reason, since every polity was governed 'according to some regulation, which we call law'. And in changing the law he should consult the multitude through his councillors, for it contributes legitimacy and breadth of experience to government.<sup>33</sup> John of Paris's *Treatise on Royal and Papal Power* of 1302 argued that each power, monarchy and papacy, had regal authority in its own sphere, but no right to interfere in the other's. Each was instituted by the people, who could ultimately depose it. The only difference was that there could be only one head for the church, whereas there was no need for one temporal ruler (as Dante argued in his *De monarchia*): the development of individual kingdoms was a natural process, and they were more peacefully ruled when a king did not strive to extend his jurisdiction beyond the limits of his own territory.<sup>34</sup>

John of Paris still argues a great political issue of his own day on the authority of the bible, Aristotle, and the early fathers of the church, but during the fourteenth century the pressures of war brought treatises on government closer to the reality of contemporary rule. Around 1340, soon after the beginning of the Hundred Years War, Walter Burley, an Oxford- and Paris-trained logician and theologian with experience in Edward III's household and as the king's envoy at the papal court, wrote a commentary on Aristotle's *Politics* which survives in a significant number of manuscripts. Essentially it is the commentary of Thomas Aquinas and Peter of Auvergne, but with one or two remarks reflecting contemporary English politics. The advantages of rule by a multitude

<sup>32</sup> Aegidius Romanus, *De regimine principum*, 238–40, 267–9; T. Renna, 'Aristotle and the French Monarchy, 1260–1303', *Viator*, 9 (1978), 312 ff.; Blythe, *Ideal Government*, chs. 4, 5, 8; Senellart, *Les Arts de gouverner*, 180–92; Krynen, *L'Empire du roi* (Paris, 1993), 101 (for the conflict between royal and ecclesiastical government as 'une argumentation Française'), 179 ff.

<sup>33</sup> *The Commentary of Peter of Auvergne on Aristotle's Politics*, ed. G. M. Grech (Toronto: Pontifical Institute of Mediaeval Studies, 1967).

<sup>34</sup> *John of Paris on Royal and Papal Power*, tr. A. P. Monahan (New York: Columbia UP, 1974), caps. 3, 13, 19, 21.



were combined with monarchy, Walter maintained, when 'the king convokes parliament for conducting difficult affairs'—apparently the first reference to the English parliament in a work of political theory.<sup>35</sup>

The idea has been advanced that England was converted in these years from a 'law-state' into a 'war-state', in which the kings were related to parliaments primarily by their need for money.<sup>36</sup> But it was rather that achievement in war enabled Edward III (1327–77), like Edward I before and Henry V after him, to exploit to the full his inheritance of a well-developed polity which had a system of justice as its central pillar. Successful kings happily promised their people to preserve 'the state of the crown' and attend to the condition of the royal household as long as they got from parliaments the taxes they needed to wage war. Weak kings were more vulnerable and more sensitive to criticism. The magnates could seek to compel the weak Edward II (1307–27) to reform 'the state of his household and realm' and ultimately depose him: kings were not to be created and discarded by their own parliaments, but a special assembly of representatives of all the estates of the kingdom might witness and legitimize a forced abdication and accept the dynastic claims of the new king.<sup>37</sup> At the height of his powers in 1353, Edward III was content that ordinances 'touching the estate of the king and common profit of his realm' should be recited at his next parliament and thus enrolled as a statute; and in 1376, with the king in his dotage and his son, the Black Prince, on his death-bed, the king's ministers were attacked in the 'Good Parliament' on the authority of such statutes.<sup>38</sup>

#### THE CONTESTED STATE OF RICHARD II

The 'state of the king' in terms of the quality of royal government was the concern of the whole community. Without a king to appeal to, Scottish abbey, towns, and lay lords were compelled in 1305 to petition for the confirmation of their liberties to their English conqueror, Edward I, who claimed the right to ensure the 'stability of the land of Scotland'. In this situation a sense of nationhood did assume

<sup>35</sup> L. J. Daly, 'Some Notes on Walter Burley's Commentary on the Politics', in *Essays in Medieval History presented to Bertie Wilkinson*, ed. Sandquist and Powicke (Toronto, 1959), 270–81; Kantorowicz, *The King's Two Bodies*, 225–6.

<sup>36</sup> The thesis of R. W. Kaeuper on the war-state, in *War, Justice and Public Order: England and France in the Later Middle Ages* (Oxford: Clarendon Press, 1988), is criticized by G. Harriss, 'Political Society and the Growth of Government in Late Medieval England', *Past and Present*, 138 (1993).

<sup>37</sup> Richardson, 'The English Coronation Oath', 50; C. Valente, 'The Deposition and Abdication of Edward II', *EHR* 113 (1998), 867.

<sup>38</sup> *RP* ii. 253 (42).

importance, and in 1320 'the nation of Scots' acknowledged in 'The Declaration of Arbroath' that 'this same kingdom and people' had been delivered from the hands of their enemies by their 'most valiant prince, king and lord, the lord Robert [Bruce]'—but went on to vow that, if Robert I ever admitted the subjection of 'our kingdom' to the English, they would drive him out as 'a subverter of his own right and ours'.<sup>39</sup>

But it was in England in the reign of Richard II (1377–99), that military failure combined with a king's high idea of his prerogatives to fuel the most bitter argument about the relationship of the king to the other estates in the *status regni*, an argument that showed to the full how government was represented and criticized as 'the state of the king'. Still only fourteen years of age, Richard was confronted in 1381 by the 'Peasants' Revolt', one of a number of popular risings in fourteenth-century Europe provoked by war, plague, and demographic crisis, which showed that ideas of political rights were spreading beyond the aristocracy and the urban patricians. Ecclesiastical chroniclers of the revolt attributed some extraordinary demands to Wat Tyler, the leader of the labourers and artisans who marched on London to show the king that they were 'the true commons', not the people in parliament who consented to the poll taxes, and to kill the king's ministers and the lawyers of the judicial commissions which had attempted to enforce the taxes. These demands were: that 'there should be no law except the law of Winchester' (the Statute of 1285 which had placed the obligation of peace-keeping on the local communities themselves); that rank should be respected throughout society but only the king exercise lordship; that there should be only one bishop in England, and the property of churchmen, beyond what they needed for their personal sustenance, be confiscated and shared between their parishioners; and that there should be no more serfdom in the land but all 'be free and of one condition'. Displaying a taste for self-dramatization, King Richard placed himself before the rebels at Mile End and undertook to do justice on any traitors they brought to him, thus giving them licence to go away and behead the chancellor (who was the archbishop of Canterbury), the treasurer, and other royal servants; and again at Smithfield, where he promised 'all he could fairly grant them, saving to himself the regality of the crown'.<sup>40</sup>

Five months after the collapse of the revolt a parliament was called to Westminster to consider the amendment of the notable defects it had shown in 'the state, peace and good government of the realm'. Criticism

<sup>39</sup> *The Acts of the Parliaments of Scotland*, i, ed. T. Thomson and C. Innes (London: Record Commission, 1844), 119; *Memoranda de Parlamento*, ed. F. W. Maitland (London: Rolls ser. 1893), 168–232; A. A. M. Duncan, *The Nation of the Scots and the Declaration of Arbroath* (1320) (London: Historical Association, 1970).

<sup>40</sup> *The Anonimale Chronicle*, 139, 145–7: tr. *EHD* iv. 135–7.

of government quickly shaded into what Richard saw as encroachment on his royal state. By their revolt, parliament was told, the common people had committed a horrible offence against 'God, the peace of the land, and the regality, state, dignity and crown (*le Regalie, Estat, Dignitee, et la Coroune*) of the lord king', and they had coloured it by saying that 'they would have no king but Richard'—as if they could do otherwise. Parliament should know that in order to stop the clamour the king had been forced to grant liberty to the villeins, but he had revoked his charters 'as soon as he was restored to his power and supreme state (*primer estat*) of king'. Asked if this repeal pleased them, the prelates and burgesses said it was well done, adding that such an enfranchisement could in any case not have been granted without their assent, since theirs was the greatest interest. In response to the treasurer's instruction to go back to their meeting-place in the chapter-house of Westminster Abbey and consider how to provide for 'the great necessity of the king' in the maintenance 'of his state and of his household (*de son Estat et de son Hostiel*)', the wars, and other things, the Commons asked to consult with a delegation of lords on the matters 'which touched so highly the state of the realm', and having done so, they said that the king had been right to grant pardons for wrongs committed during the troubles as a way of restoring calm.<sup>41</sup>

But the Commons further asked that the situation should be discussed separately by the prelates, the lords temporal, the knights, the justices, 'and all other estates', who should report their advice to the Commons so that a remedy could be ordained, whereupon the king insisted that 'the ancient custom and form of parliament must be observed', by which the Commons gave their advice to king and lords for them to decide and not *e contra*. The Commons then said that after diligent consultation with prelates and lords it seemed to them that, if the governance of the realm was not quickly amended, the realm itself would be utterly lost and destroyed, and king, lords, and commons with it, such were the defects in that governing (*gouvernaill*): around the person of the king and in his household, on account of the outrageous number of familiars there; in his courts of chancery, king's bench, common pleas, and exchequer; and in the country, where there was no right or law because of the outrageous multitude of maintainers of quarrels, who behaved like kings, and of purveyors for the king's household, who paid the poor commons nothing for the supplies they requisitioned. Despite the continual levies for the defence of the realm, the people were no better defended from enemy raids, and their rioting was explicable. To save 'the estate and dignity' of the lord king and 'the

<sup>41</sup> RP iii. 98–100; SR ii. 20 (v); N. Saul, *Richard II* (New Haven and London: Yale UP, 1997), 76–9.

noble estates of the lords' bad councillors and justices must be replaced, and the lords must not use the 'power they had in their great estates' to thwart the remedies provided for the people as a whole. When Richard appointed his uncle, John of Gaunt, duke of Lancaster, and a group of earls and bishops to examine 'in privy council . . . the Estate and Government' of the king and his household, the lords in parliament said bluntly that amendment of government throughout the realm should 'start with the principal member, which is the king himself, and then proceed from person to person, including the men of Holy Church, and from the highest place to the lowest, sparing no person, degree or place'.<sup>42</sup>

The 'absolutism' of Richard II may have drawn inspiration from the *De regimine principum* of Giles of Rome, a book known to have been in the library of Simon Burley, the young Richard's tutor and presumably a kinsman of Walter Burley, the commentator on Aristotle and tutor of Richard's father; particular intransigence against Simon was shown by Arundel and his allies when they had some of the king's closest friends condemned to death or exile at the 'Merciless Parliament' of 1388. The influence of Roman law has also been seen in Richard's quite sudden insistence in the 1390s on new forms of ceremonial and royal address emphasizing his 'majesty'.<sup>43</sup> But a sufficient intellectual inspiration could have been found in traditional ideas of the hierarchy of authority and the king's responsibility for maintaining the peace of church and realm, such as were expressed in the first years of the reign by John Wyclif in his tracts *De Civili Dominio* ('On civil lordship') and *De Officio Regis* ('On the office of king'). A 'civil policy' consists (*stat*), said Wyclif, in a settled order which allots men's rank (*gradus*) from lowest to highest, and the policy which best does this is monarchy. The king has a threefold existence in his kingdom: in the space he occupies as an individual, in the space over which his presence is immediately felt, and in the space (co-extensive with the kingdom) throughout which his influence makes him virtually or potentially present. Home-grown themes stand out in a version of the tract on the office of king which Wyclif soon provided in English so that it should be 'more knowen' how kings ought to rule—not as tyrants, but 'by reason that falls to their state'. 'The king should maintain his lordship by power of his law', in accordance with statutes which in England excelled in being few and

<sup>42</sup> RP iii. 100–2, 104 (38); Saul, *Richard II*, 80–1.

<sup>43</sup> M. V. Clarke, *Fourteenth Century Studies*, ed. L. S. Sutherland and M. McKisack (Oxford: Clarendon Press, 1937), 120; R. H. Jones, *The Royal Policy of Richard II: Absolutism in the Later Middle Ages* (Oxford: Blackwell, 1968), 144, 159–63, and ch. 12; the treatise by Giles of Rome was also translated into English by the Oxford scholar, John Trevisa (1326–1412); N. Saul, 'Richard II and the Vocabulary of Kingship', *EHR* 110 (1995), 861, 868 ff.; id., *Richard II*, 237, 340–1.

therefore easy to understand, and using secular lords and the knightly class to enforce them. The point of Wyclif's argument is that the clergy should not have temporal power or great possessions, since 'the worship of priests' was 'grounded in virtues', only 'the worship of lords . . . grounded in states'. The king fulfilled his office when he kept lords, commons, and labourers in harmony in their proper 'states', and 'then were Christ's realm well set in its state'.<sup>44</sup>

The more Richard was led to exalt 'the state of the king' the more he was personally humiliated. In 1386 he saw Michael de la Pole, by then his chancellor and earl of Suffolk, impeached and imprisoned, when he came to 'the wonderful parliament' asking for an aid to save the realm from the enemy. Pole was accused among other things of failing, as one who represented *l'estat du roi*, to act on the advice of the lords appointed to recommend how 'the state of the king and the realm' could be put 'in better governance and disposition'—advice which seems to have been that the size of the king's household should be reduced and 'his state concerning (*touchant*) the revenues and charges of his exchequer' be audited. The chronicler Henry Knighton writes that the king's resistance to his chancellor's impeachment was overcome by a reminder of the fate of Edward II, which was said to have been in accordance with an 'ancient law' giving the people (not specifically parliament) power to depose a king who would not be 'governed and guided by the laws of the land and its enactments and laudable ordinances' and by 'the wholesome counsel of the lords and nobles of the kingdom'.<sup>45</sup>

A further act of this parliament appears to have fuelled the king's resentment for the rest of his reign, as an affront to his 'prerogative or the liberties of his crown': the forcing of his assent to a Commons petition that fourteen bishops and nobles should be appointed, if only for a year, to have (as he afterwards complained) 'government [*gubernaculum*] of the whole kingdom'. Within the year Richard put ten questions to his judges at a meeting of his council at Shrewsbury (and repeated the operation at Nottingham) to elicit the judgments that those who had procured the appointment of the commission had indeed attacked the king's regality and prerogative and should be executed as traitors, and that parliament could not impeach the king's ministers without his will. The ninth question showed that Richard resented

<sup>44</sup> John Wyclif, *Tractatus de Civili Dominio Liber Primus*, ed. R. L. Poole (London: Wyclif Society, 1885), 185–98; *Tractatus de Officio Regis*, ed. A. W. Pollard and C. Sayle (London: Wyclif Society, 1887), 49–59, 65–7, 70–1, 92–3, 79; *Four English Political Tracts of the Later Middle Ages*, ed. Genet, 5, 8, 9, 13, 14, 19; Anne Hudson, *Lollards and their Books* (London, 1985), 10, 141, 144.

<sup>45</sup> RP iii. 215–18, 221–4; EHD iv. 150–2; *Select Documents*, ed. S. B. Chrimes and A. L. Brown (London, 1961), 160–2; *Knighton's Chronicle, 1337–1396*, ed. and tr. G. H. Martin (Oxford: Clarendon Press, 1995), 352 ff., 360–1; Clarke, *Fourteenth Century Studies*, 48–52.

above all that parliament had presumed to turn into a statute the grant like that made by Edward II in 1310 of a commission with 'full power to order the state of our household and our realm' (*plein poair de ordener l'estat de nostre hostel & de nostre roiaume*). The judges were arraigned, and the chief justice, Robert Tresilian, was the most notable of those executed at 'the Merciless Parliament' of 1388, in which the king's uncle, Thomas duke of Gloucester, his cousin, Henry Bolingbroke, earl of Derby (the future Henry IV), and the earls of Arundel, Nottingham, and Warwick turned the accusation back at the king's ministers and friends and charged them of 'accroaching to themselves royal power, disfranchising our said lord the king of sovereignty, and stealing and diminishing the royal prerogative and regality'. To avoid the objection to impeachment without the king's consent the five lords adapted the common law process of 'appeal of felony' to bring their victims before parliament, and when this procedure also was adjudged unknown to English Law or Civil Law, declared that the realm of England never was ruled by Civil Law, and it was the intention of the king and the lords of parliament that it never should be; moreover, English courts were 'only executors of ancient laws and customs of the realm and ordinances and establishments of parliament', and it was the lords' intention that such a high crime as this, 'which touched the person of the king . . . and the state of all his realm, and was perpetrated by . . . peers of the realm', should be tried 'by law and course of parliament' the lords acting as the judges.<sup>46</sup>

It is significant of the concern for government according to the law that Richard was presented with a collection of the statutes in 1389, the year in which he was at last able to say: 'I am of full age to govern my house and household and also my kingdom. It seems to me unjust that my state should be worse than that of the least person in the kingdom.'<sup>47</sup> In 1391 the Commons prayed that the king should 'be free in his regality, liberty and royal dignity' as any of his progenitors had been, notwithstanding any statute or ordinance previously made, particularly 'in the time of King Edward the Second, who lies at Gloucester'. Richard thanked them for their tenderness to his 'honour and his state', and delayed his revenge for the humiliations of 1386–8 until 1397. At the beginning of that year he put on a show of anger when he learnt from the chancellor and the lords that the Commons had raised with them concerns which 'seemed to him against his regality and state [*sa Regalie & Estat*], and his royal liberty', the most offensive complaint

<sup>46</sup> RP iii. 221–4, 229–45; SR ii. 44–6; EHD iv. 154–63; *Knighton's Chronicle*, 368–89, 392–9, 453–505; S. B. Chrimes, 'Richard II's questions to the judges', *Law Quarterly Review*, 72 (1956), 365–90; D. Clementi, 'Richard II's ninth question to the judges', *EHR* 86 (1971), 96–113.

<sup>47</sup> Saul, *Richard II*, 237; EHD iv. 164–5.

being the cost of the multitude of bishops, ladies, and their retainers enjoying the hospitality of the royal household. The Commons had no business discussing 'any person of Estate whom he pleased to have in his company' and were made to grovel and reveal the source of the complaint: a bill exhibited to them by one Thomas Haxey, not one of their members but a royal clerk, who was brought before parliament and condemned by the lords as a traitor. At the plea of the bishops Haxey was quickly forgiven, but both the substance of the retrospective judgment and the way it was obtained were unprecedented: an individual 'of whatever status or condition' would be punished as a traitor who inspired the *Communes Parliamenti* to reform anything touching the king's person, government, or regality (*Regimen, aut Regalitatem*).<sup>48</sup>

Richard was intent on erasing the humiliations of ten years before. In June 1397 the earls of Arundel and Warwick were lured into meetings where they could be arrested, and the king led a force of household troops by night to apprehend his uncle, the duke of Gloucester, and promise him the same quantity of mercy as he had shown Simon Burley. In August, another bill of appeal was presented at a council meeting in Nottingham castle: before Richard, 'in his *Roial Estat*', with the crown on his head, the three prisoners were accused of conspiring against his 'high and royal majesty, crown and estate', as traitors to king and realm. In September the process was continued in parliament at Westminster, where Richard, attended by a force of his Cheshire archers, presided 'in greater splendour and solemnity than any king of this realm before', in a specially constructed hall 'from which he could deliver his judgments', and the chancellor in his opening sermon founded good governance on the obedience of subjects to a powerful king and the laws he made to teach them how to behave towards him and one another. A general pardon was promised for the high crimes and misdemeanours the people had committed 'against their allegiance and the state of our lord the king and the law of his land', but certain offences were to be excepted from it, and fifty individuals whom the king would name.<sup>49</sup>

The speaker, Sir John Bussy, denounced Gloucester and Arundel as traitors for procuring 'by statute' the commission of 1386 which gave them and others 'the government of the king and realm, both within the king's household and beyond'. The commission was read and repealed

<sup>48</sup> W. Mager noted the frequency of references to the 'regality and state' of the king of England in the 1390s: *Zur Entstehung des modernen Staatsbegriffe* (Wiesbaden, 1968), 66; *RP* iii. 279 (15), 286 (13), 338–41, 343 (28), 407–8, 420; in Henry IV's first parliament, the Commons were quick to obtain the repudiation of the judgment against Haxey: *ibid.* 420, 434; *EHD* iv. 167–9; T. F. T. Plucknett, 'Impeachment and Attainder', *TRHS*, 5th ser. 3 (1953), 148–9; *The History of Parliament: The House of Commons 1386–1421*, ed. J. S. Roskell, Linda Clark, and Carol Rawcliffe, 4 vols. (Stroud, 1992), i. 80–2.

<sup>49</sup> *RP* iii. 347, 374; Plucknett, 'Impeachment and Attainder', 149 ff.; *Chronicles of the Revolution, 1397–1400*, ed. C. Given-Wilson (Manchester, 1993), 54 ff.

as a usurpation of royal power, along with the pardon that Gloucester, Arundel, and Warwick had prudently obtained for their actions in the parliament of 1388, so that they could be tried and condemned before the lords. The Commons also sought the king's leave to impeach Thomas Arundel, the earl's brother, who had been chancellor in 1386 and for most of the years since and was now archbishop of Canterbury, for his essential part in the drawing-up of a commission which had been 'expressly against the king, his state, his crown, and his dignity', a phrase used repeatedly in the proceedings of the parliament, 'the peace of the realm', 'royal power' or 'liberty of the crown' sometimes replacing the king's 'state'.<sup>50</sup>

Richard was alleged to have told one of his closest servants, probably in the summer of 1398, that his one ambition was to see the Crown of England enjoying the prosperity and obedience it had under his predecessors, and to 'be chronicled perpetually that with wit and wisdom and manhood he had recovered his dignity, regality, and honourable estate'. But the truth of his state was that it depended on his ability to exercise authority over the magnates and use parliament as effectively as it had been used against him. In an attempt to consolidate his victory in 1397, the definition of treason was extended by statute from killing the king to plotting his deposition, and the answers of the judges in 1387 were reaffirmed by 'all the estates of parliament', and the proceedings of 1388 were formally annulled. On the petition of the Commons it was ordained that anyone seeking the repeal of any judgments or statutes of the parliament of 1397-8 should be adjudged a traitor, and that the lords should take individual oaths to observe them. The king was advised, however, that it would be 'against the liberty of the crown' for him to seek to bind his successors, by oath or any other way, and proposed rather to ask the pope to pronounce sentence of excommunication on contrarians.<sup>51</sup>

The continuing arbitrariness of Richard's rule did in fact lead to the immediate repeal of the acts of the parliament of 1397-8 and the restoration of those of 1388, when Bolingbroke returned from banishment to usurp the throne in 1399. In the first parliament of Henry IV proctors 'for all the estates and people' of England (a bishop and an abbot for the clergy, an earl and a baron for the nobility, a knight 'for all the bachelors and commons of this land by south' and another for those 'by north', along with the chief justice and another justice of common pleas) declared that Richard was 'deposed and deprived' of

<sup>50</sup> RP iii. 348-51, 374-85; EHD iv. 170-2.

<sup>51</sup> Simon Walker, 'Richard II's Views on Kingship', in *Rulers and Ruled in Late Medieval England: Essays Presented to Gerald Harriss*, ed. R. E. Archer and S. Walker (London, 1995), 50; RP iii. 351-9.



'the Estate of King' because of his 'defaults in governance'. The Commons in parliament could nevertheless protest to the new king that they intended nothing and discussed nothing against his 'prerogative or estate royal'.<sup>52</sup>

#### THE KING IN THE FRENCH BODY POLITIC

The king of France was subjected to stern advice about kingship from churchmen, but he never allowed assemblies of estates to be used to prescribe how he governed. An early vernacular tract on government or *princey*, 'The estate and governance (*L'estat et le gouvernement*) of a prince', written, perhaps for the future King John, in 1347, and translated into English a hundred years later for King Henry VI, exhorts the 'Prince or great estate of this world' to follow the 'prudent counsel' of Giles (of Rome) and first learn 'the state of himself' so that he will 'be governed after his estate'. Then he must see that his household and domains are properly ruled, with special attention to his revenues and spending 'for the good governance of his estate' and the defence of his principality. Above all, a prince is established by God in 'his estate and reign' to govern his people justly. He should not despair if he finds his lands in a 'feeble state' when he first comes to govern, but set out to reform what is amiss with the help of 'good and true counsel', travelling about to listen to his subjects' *plaintes et doléances* and appointing wise and loyal 'refourmateurs' who will take pains to do justice on their grievances.<sup>53</sup>

In that year of 1347, following the English victory at Crecy, an assembly of the French estates, the Parisian bourgeoisie to the fore, were complaining bitterly of the poor return they were getting for the endless taxes imposed upon the country. By the time Nicole of Oresme, a master of the university and royal servant who died in 1382 as bishop of Lisieux, wrote for Charles V 'the earliest viable translation' of Aristotle's *Ethics* and *Politics* into a vernacular language and composed the most pertinent commentary upon them (for which the king paid 220 gold francs), the chances of the estates-general scrutinizing taxation and participating in reforming legislation had been blown away. After the brutalities of the Jacquerie of 1358, when the peasants in central France sacked the castles of the nobles they saw as deserting the reforming cause, only to be slaughtered in their turn and take down with them

<sup>52</sup> RP iii. 422-44, 572; EHD iv. 172-87.

<sup>53</sup> *Four English Political Tracts*, ed. Genet, 180, 183-4, 188-9, 206, 210, 217-18; see R. Cazelles, *La Société politique et la crise de la royauté sous Philippe de Valois* (Paris, 1958), 403-26, for a succinct description of French royal government at this time.

Étienne Marcel, provost of the merchants of Paris and leading proponent of reform in the estates-general, French kings never trusted general assemblies and rarely called them.<sup>54</sup>

In his marrying of Aristotelian theory with experience for the use of Valois France, Oresme assumes a *policie* in which a king has sovereignty, and 'political' rule is what subordinate princes exercise in the provinces. But he also takes it for granted that the king holds a 'noble public office' and governs like other 'public persons' for the common good and guided by 'political science'. Royal power is limited by no superior organ of government but always by the laws of the community, and it is more necessary to be governed by good laws than by a good prince. 'Policies' are corrupted both by unjust laws and by the princes' substitution of their will and power for laws. Discipline, teaching, and good laws are needed to restore a policy to health: laws which are written down, but are neither the Roman law invoked by tyrannical kings nor rulers' self-made edicts. The 'laws and statutes' Oresme describes as convenient for a policy sound like contemporary French ordinances: those that discouraged excessive eating and drinking and fostered useful labour, honest service, and skill in arms. And they would be made by the advice of councillors not accustomed to lie, and the consent of the people who used them.<sup>55</sup>

Oresme writes that the 'reformation and correction' of the laws made by ecclesiastical authority, which is also a 'princey', 'belong to the multitude' speaking through a council of the church. All constitutions that are good because they work for the common profit, not least the good form of monarchy which he calls *royalme*, are in some sense mixed and give all the citizens a part in ruling. Glossing Aristotle on the different sorts of constitution, he explains that the type of 'ordering of authority' (*ordre de princey*) in a country is decided by the variety and relative weight of the 'estates, offices or occupations'. Constitutions are as variable as mariners' wind directions—south-west, north-east etc. They may also be characterized by the harmony of their parts: the music of tyranny and oligarchy is too harsh, that of democracy is too emollient, and it is *royalme* and aristocracy which move to a well-tempered music. But in any polity aristocracy, timocracy (rule by a

<sup>54</sup> Cazelles, *ibid.* 224–6, 427–9; *id.*, *Société politique, noblesse et couronne sous Jean le Bon et Charles V*, 318–37, 491, 536; P. S. Lewis, 'The Failure of the French Medieval Estates', *Past and Present*, 23 (1962): repr. in his *Essays in Later Medieval French History* (London, 1985).

<sup>55</sup> *Maistre Nicole Oresme Le Livre de Politiques D'Aristote*, ed. A. D. Menut, TAmPhilSoc 60, part 6 (1970), 153 (fo. 113a), 158–60 (fos. 118d–123b), 196 (fo. 157c), 243–4, 257 (fo. 217b), 310–11 (fos. 268b–269a), 322–9 (fos. 279a–285c), 365–6 (*policie* in the index of terms); Susan M. Babbitt, *Oresme's Livre de Politiques and the France of Charles V*, TAmPhilSoc, 75, part 1 (1985), 76–9, 84–5, 91–3; Blythe, *Ideal Government*, 203–40; Cazelle, *Société politique . . . sous Jean le Bon et Charles V*, 507–8; Krynen, *L'Empire du roi*, 115, 118–19.

wider class of property-holders), and the multitude tend to overlap, and the whole is best represented by a middle class of administrators. In a temporal kingdom Oresme thus seems to regard the ruler as being restrained not by general assemblies but by the balance of estates in the administration of the country. The king has sovereignty 'but in many great matters can do nothing' without the concurrence of another authority (*princey*), such as 'the *parlement* in France' or the old Roman senate. Since the law has no superior, *parlement* is the highest of the counterbalancing powers in the land, but the Chambre des Comptes follows close behind.<sup>56</sup>

On Aristotle's dictum that princes should obey the unwritten custom lying behind good laws, Oresme hangs a long gloss discussing the just distribution of honours within the church. Aristotle had advised that too gross inequality in the distribution of positions and wealth should be avoided in a good policy, but it had not been sufficiently guarded against in the church. Ambition, fraud, and pomp had debased the morals of the clerical estate, and taken other estates down with them. Elsewhere Oresme enters one of the great controversies of the previous century, that surrounding the doctrine of apostolic poverty. Other works of Aristotle are cited to the effect that various sorts of people are necessary for religious worship, but they should be honourable in birth, body, morals, and estate. It was a virtue to live simply by a little honest labour and leave space for contemplation, but to beg and demand to live from others' goods was unworthy of a priest.<sup>57</sup>

Oresme's attention was engaged by one further issue of contemporary government, to which he devoted a separate work, his Latin treatise *De Moneta* ('The Mint'). Ptolemy of Lucca had identified the 'royal state' and the interests of the people most closely in respect of the production and circulation of money. Oresme continued a theoretical widening of the concerns of government from justice and peace to the management of the economy which was inspired as much by the practical politics of contemporary France as by Aristotle's *Oeconomica*. The *De Moneta*, written during the great meetings of the estates-general in the mid-1350s to grant and control war-taxation, insisted that the coinage belonged to the whole community of citizens, which could no more allow the prince to debase and alter it for revenue

<sup>56</sup> *Le Livre de Politiques*, 128 (fo. 87c-d), 168-9 (fos. 130b-131b), 196-7 (fos. 157a-158c), 242, 258-9, 292, 309 (fo. 267b-c), 373 (for *princey*); cf. *The Politics of Aristotle*, tr. Barker, 113-16 (book 3, caps. 7-8); Blythe, *Ideal Government*, 229-40; Krynen, *L'Empire du roi*, 273.

<sup>57</sup> *Ordonnances des Roys de France*, ii. 529, 557, iii. 675; Delachenal, 'Journal des États Généraux . . . d'octobre 1356', 449; *Le Livre de Politiques*, 159-61 (fos. 119d-124d), 196 (fo. 157a), 306-8 (fos. 264d-266d), 318-20 (fos. 275d-277c); cf. *The Politics of Aristotle*, tr. Barker, 86, 117-18, 147, 277, 303, 309-10; Babbitt, *Oresme's Livre de Politiques*, 98-125; Blythe, *Ideal Government*, 234-6.

purposes than they could authorize him to misuse their wives. The prince as 'the most public person' minted money for the community and put his stamp upon it, but it was tyranny for him to manipulate it without explaining to 'the community or the better part of it' what and how great a necessity demanded such action. But the needs of *l'estat du roi*, in the narrow sense of the state of his treasury, were always liable to prevail.<sup>58</sup>

It was in France that Aristotelian philosophy was first brought to focus in this way on the structure of an actual kingdom, so that after Oresme the French polity could be treated as a thing in itself by writers with a variety of backgrounds outside the university. Philippe de Mézières dressed the old argument for peace and reform in France to make way for a crusade in a vast and complicated allegory which yet contains a rich vein of his practical experience as a pilgrim to the Holy Land, a traveller in Prussia and Spain, a servant of the king of Cyprus, and finally a member of the entourage of Charles V, to whose son, Charles VI, he became tutor. The first of the three books of *Le Songe du Vieil Pèlerin* ('The Dream of the Old Pilgrim', said to have been dreamed in 1389, the ninth year of the reign of Charles VI), follows Queen Truth and her sisters, Peace, Mercy, and Justice, on a world tour, where they are shown symbolically testing the Christian virtue of the various principalities and powers by assays, made before *parlements* of nobles and people, of the purity of their coinages. Asia and North Africa are visited as well as the countries of eastern Europe and Scandinavia. The great Italian cities get particular attention, the visit to Rome providing the opportunity for a disquisition on the history of the Roman empire and papacy and the sins of contemporary Romans and churchmen. After Rome and Avignon (the seat of an antipope, where the commission decides it can do nothing), Truth and her companions continue this earliest of surveys of the polities of Europe with visits to the Spanish kingdoms, Gascony, and Brittany, and from this 'Petite Bretayne' they cross to 'Grant Bretagne', where they find no coinage of the good alloy that there was in the time of Saint Anselm, the Venerable Bede, and their good kings. In a consistory of the barons, townsmen, and commons in London, Peace arraigns this people as her particular enemies. We are told that the ravaging of France by the old Black Boar [Edward III] has twice in the Pilgrim's lifetime thwarted crusades to recover the Holy City, but the young White Boar now reigning [Richard II] wants peace, for 'despite the capture of the King of Scotland and the two horrible

<sup>58</sup> *The De Moneta of Nicholas Oresme and English Mint Documents*, with facing translation by C. Johnson (London, 1956), 10, 35–42; *Ordonnances des Roys de France*, iii. 520–2; Cazelles, *Société politique . . . sous Jean le Bon et Charles V*, 102, 389–99, 418–19, 491, 510–11, 531–8; Babbitt, *Oresme's Livre de Politiques*, 86 ff.; Krynen, *L'Empire du roi*, 219–20, 268, 420.

victories of Crecy and Poitiers' in France, the English no longer hold a tenth of either kingdom.<sup>59</sup>

So, via the county of Flanders, the party comes at last to Paris and an examination of the money of France and how it needs to be reformed, which takes up the second book of the *Dream*. De Mézière's polity, like Oresme's but with much greater complexity, is analysed as a collection of estates possessing a variety of roles. To await Queen Truth's judgment, the 'three estates general' (meaning the whole people) of the Île de France, Picardy, Champagne, Normandy, Poitou, Guienne, and the other provinces are arranged into four orders, each a threefold 'hierarchy'. The first (clerical) hierarchy is thus composed of prelates, parish clergy, and members of religious orders; the second consists of king and princes, knights and gentlemen, and military officers; the third is a professional group of *parlementaires* and judges, advocates and notaries, and financial officers; and the fourth lumps together the commercial aristocracy, master craftsmen and workmen.<sup>60</sup>

A new and striking image of political society is introduced in book 2: France becomes a great ship called *Gracieuse*. Before its appearance a member of the fourth hierarchy has already confessed and lamented the rebellion of the common people against their natural lords which was provoked by the 'piteous tragedy' of war; and *Hardiesse* from the third hierarchy, one of Queen Truth's chamberlains, has singled out for 'a long and horrible narration' the greed and presumption of financial officials which have made humbly-born treasurers of war 'of greater estate' than a duke of the realm. For 'the common good of the king and his people' their 'outrageous numbers' and the 'multitudes of books and papers of account of the realm of France' should be cut down to the levels of Venice, where one man is elected to govern 'the exchange called the bank of the commune' and can show 'the whole state of the city' on one piece of paper. The numbers of judges and officers of *parlement* are likewise too great—it would be better to use panels of unpaid arbiters chosen from the three estates, as in Milan.<sup>61</sup>

It was a more perilous matter to criticize the second, seigneurial or ruling, hierarchy, especially at the highest level of king, princes, and barons of the realm. The ship of France is introduced to give these lords a true sense of their estate and the dignity of their office. It is sailing to Jerusalem to buy the true elixir of life and the philosophers' stone, under a master who is a merchant-prince named 'Christian' and officers who

<sup>59</sup> Philippe de Mézières, Chancellor of Cyprus, *Le Songe du Vieil Pèlerin*, ed. G. W. Coopland, 2 vols. (Cambridge UP, 1969), i. 29–34, 38, 32–3, 117–89, 239, 371, 375, 394–400; *ibid.* i. 106–14 for Philippe's list of all the allegorical figures in the work; Krynen, *L'Empire du roi*, 195–8.

<sup>60</sup> *Le Songe du Vieil Pèlerin*, i. 38–41, 409–41, 446–8,

<sup>61</sup> *Ibid.* i. 455, 458, 462, 474–80, 492, 503.

are like him in their disciplined living and estate; there is no vanity or extravagance at the court of this prince, and he is at the same time rich and loved and feared by all. *Gracieuse* (also called *Souveraine*) has accommodation for all those necessary on the greatest ship since Noah's ark, people of every trade and agricultural skill: we are presented again with the whole of society in order to place the ruling part within it. The quality of the vessel's money and crew are the envy of the seventeen other ships, representing Christian kingdoms from Scotland to Armenia, with which the French ship trades on the long voyage. Over the centuries *Gracieuse*, with its three decks standing for the estates of the clergy, nobles, and people, and its twelve castles for the strongholds of the twelve peers of France, has had to suffer terrific storms and much damage from the attacks of *Malvoisine*, the ship of England. In the Old Pilgrim's time ignorance of the law of merchants and the rebellion of the mariners once again let in this enemy, but God has raised up a young master [Charles V], who by good sense and without great battles recovered much that had been lost. The lesson concerning the governing hierarchy which the figure of the ship makes most effectively is that to rely on councillors who seek only to live 'in too great estate' invites disaster to the polity. A vivid account of the shipwreck of a king of Cyprus illustrates the consequences of not listening to 'ancient and loyal mariners'.<sup>62</sup>

In de Mézière's third book Truth moralizes the government of France in terms of a four-wheeled chariot from which the king plays a game of chess—an unlikely metaphor which turns out to allow a detailed breakdown of the government and a set of practical proposals for its improvement. Officials must be chosen carefully and should be required to submit reports on their performance at least every two months, treasurers accounting for the state of the crown lands, captains (*chevetaines*) for the state of the kingdom's frontiers, others for the state of *parlement* and how poor litigants are being protected from the wiles of advocates. The ultimate goal of government is the public good, which consists in justice, peace with England, a sound currency, and a healthy commerce such as the Old Pilgrim has seen in Cyprus and contrasts with the poverty and savagery of Scotland. There should be an open review with the three estates of the service they owe to the king, and also what subjects, especially of the knighthood, should receive from the king, 'according to their estate'. The French people (*le peuple gallican*) must no longer be impoverished by the unceasing demand for aids, which has caused much disaffection and almost sunk 'the French ship'; the needs of the *chose publique* should be met by agreement as 'between two

<sup>62</sup> *Le Songe du Vieil Pèlerin*, i. 525–6, 532–3, 537–8, 543–5, 549 ff., 580–2, 587–9, 594–630.

persons equal in estate and dignity', after open and honest discussion in council. De Mézières continues the emphasis of French writers on the king's need for good council, and adds to it a warning against 'public alliances' among subjects which go beyond the normal allegiance of feudal lords and vassals, such as alliances between magnates and royal officials that allow the former to learn government secrets. Movement around the chessboard to inspect the workings of French government culminates in a detailing of preparations for the passage to the Holy Land. Truth recommends that a council drawn from 'the four hierarchies of the three estates' be assembled to grant a subsidy to the king, to agree on laws curbing extravagance in French society for the king to approve, and to appoint suitable men in each bailliage, again drawn from the three estates, to settle law-suits quickly (against the protests of advocates) and end private war.<sup>63</sup>

*Le Songe du Vieil Pèlerin* was an impressive attempt to capture the structure of the French polity, and the image of the great ship was needed to represent a unity of purpose among an increasing diversity of estates: a function more often, if less forcefully, performed by the metaphor of 'the body politic' with head, soul, and members. The idea that the secular polity was 'a mystical body', like the Church, was gaining currency from Charles V's reign.<sup>64</sup> But lawyers and politicians could express the notion of a governing part in other and less fanciful ways than as the master of a ship or head of a body. Perhaps from the death of the last and childless son of Philip the Fair in 1328 and the accession of the new Valois dynasty, continuity of rule was symbolized at a king's funeral by the fact that the presidents of the chambers of *parlement* alone did not wear mourning—the administration of justice was one thing that never died.<sup>65</sup> An older idea which gained strength in the troubles of the fourteenth century was that of the 'Crown' as the property and powers to which each king succeeded only as a steward, and which his people insisted that he should not alienate or diminish. Deputies chosen from the three estates summoned to the great meeting of 1356 were sworn to give loyal advice, make provision, and report back to their estates concerning the 'crown' as well as the 'state' of France, the means of the king's deliverance from captivity, the 'estate' of the duke of Normandy (the dauphin), and the *chose publique*.<sup>66</sup> The

<sup>63</sup> Ibid. ii. 3–114, 175 ff., 226, 278, 284, 292, 298, 306, 316, 319, 344–6, 350–5, 363, 369 ff., 385–403; *The Cambridge History of Political Thought c.350–c.1450*, ed. J. H. Burns (Cambridge UP, 1988), 540–1; on the 'public alliances' De Mézières warns against see P. S. Lewis, 'Of Breton Alliances and other Matters', repr. in his *Essays in Later Medieval French History* (London, 1985), 69–71.

<sup>64</sup> *Le Songe du Vieil Pèlerin*, i. 112, ii. 96–8, 432–3; Kantorowicz, *The King's Two Bodies*, 218.

<sup>65</sup> Kantorowicz, *ibid.* 417–19.

<sup>66</sup> Cazelles, *Société politique, noblesse et couronne sous Jean le Bon et Charles V*, 505–16;

notion of the crown seems to converge with that of the *chose publique* (an exact translation of *res publica*, the public ‘thing’ or ‘wealth’) as this was understood by the early French humanist, Pierre Bersuire, the prior of Saint-Éloi in Paris throughout the political storms of the 1350s. In the translation of Livy’s *History of Rome* (later the inspiration of Machiavelli’s *Discourses*) which he made for King John it is defined as ‘no other thing than the public or common state, [but one that is] not general to all estates of lands, countries, realms and cities (*l’estat publique ou commun, et non general à touz estaz de terres, pais, royaumes et citez*)’. This is ‘the state of the commonwealth’ not, Bersuire appears to be saying, in the sense of the whole wealth of the community, but in the sense of the powers and resources deployed by the king in its name, and therefore almost identical with the crown and ‘the state of the king’.<sup>67</sup>

#### FRANCE AS L’ÉTAT MONARCHIQUE

France’s changing fortunes in the fifteenth century confirmed that the strength of its polity depended on the king’s ability to use and control privileged groups of individuals rather than political assemblies. During the early years of the century Christine de Pisan made the need for a harmony of estates a chief theme of works in which she applied the lessons of Aristotelian thinking more directly than her predecessors to her adopted country’s political situation. As the reign of Charles VI approached collapse under the impact of the king’s madness and the rivalry of factions, Christine first of all harked back to the political skills and concern for the *bien commun* of the ruler who had engaged her father, an Italian astrologer, to conjure the English out of France. In *The Deeds and Good Customs of King Charles V the Wise*, written in 1404 as a model for the dauphin, she celebrated the old king’s chivalry but also his willingness both to learn the elements of political prudence from Giles of Rome and other works he had translated and to take counsel from everyone, including townsmen and the poor. She found it necessary to show how the *chevalerie*, the order of knighthood, was linked to ‘other human institutions’, which meant investigating ‘the origins of seigneurial and princely power’. According to philosophical tradition it had been the people who decided, in the anarchic conditions

Krynén, *L’Empire du roi*, 147, 153 ff.; Delachenal, ‘Journal des États Généraux réunis à Paris au mois d’octobre 1356’, 431.

<sup>67</sup> F. E. Godefroy, *Dictionnaire de l’ancienne langue française*, ix (complément), s.v. *chose publique*, citing BN ms. 20312, fo. 1v; L. Pannier, ‘Notice biographique sur le bénédictin Pierre Bersuire’, *Bibliothèque de L’École des Chartes*, 33 (1872), 325–54.



of the earliest society, that they should choose a prince to settle disputes and punish crimes, and to 'divide his people into different estates', appointing some to work the land, some to learn jurisprudence and help princes make laws which would ensure a just order in the *chose publique*, and some to cultivate the sciences of the causes behind natural appearances. Aristotle's authority is invoked for the need of people of a middling condition between the very rich and the very poor if 'the state of society' is to be kept in balance. The office of the king was 'closest to God in the order of estates' because on earth he was 'the first cause'.<sup>68</sup>

By the time she wrote her 'Book of the Body Politic' (*Le Livre du Corps de Policie*) in 1406–7, Christine could no longer maintain that the foundations which Charles V laid to 'the most brilliant kingdom ever seen' remained unshaken despite his successor's tragic malady, for the new duke of Burgundy, John the Fearless, had moved to seize control of the dauphin and was about to have the duke of Orleans murdered in a Paris street. She now resorts to the organic metaphor to recall the estates to their responsibilities to each other. The prince is the head and 'sovereign' and from him should come particular 'establishings' (to borrow a word used by an English translation of the work made about 1470), just as from any person's mind come the external works which the body's members achieve. The second part deals with the knights and nobles who are the hands and arms and should defend the *chose publique* and correct the commons, the third part with the rest of the people who make up the belly, feet, and legs. Remarkably, Christine places the clergy here and makes them the first of three estates of townsmen, above the merchants and the craftsmen and labourers. All are necessary to the body, the labouring feet most of all. In this work sympathy is shown for the burdens *le menu peuple* bear, and the 'murmuration' that once (i.e. in 1358) occurred between the belly and the members, causing the limbs to waste away, is partly blamed on the failure of the great of the land to do their duty.<sup>69</sup>

Christine de Pisan's third major political treatise, *Le Livre de la Paix*, was begun to celebrate a peace patched up in the summer of 1412 between the Burgundians and their opponents, and again its first part concerns the king, in particular in his relations with his councillors, who

<sup>68</sup> P. S. Lewis, 'Society and Sovereignty in Fifteenth Century France', in his *Essays in Later Medieval French History*, 12, 24–5; Cazelles, *Société politique . . . sous Jean le Bon et Charles V*, 48–51; Christine de Pisan, *Le Livre des Faits et Bonnes Moeurs du roi Charles V le Sage*, introduced by E. Hicks and T. Moreau (Paris, 1997), 111–15 (part 1, caps. 2, 3), 204–6 (part 2, cap. 6), 210, 212, 296 (part 3, cap. 63).

<sup>69</sup> Christine de Pisan, *Le Livre des Faits*, 142–3, 207–10; *Le Livre du Corps de Policie*, ed. R. H. Lucas (Geneva, 1967), 1–3, 103, 166–76, 191–2, 199; *The Middle English Translation of Christine de Pisan's Livre du Corps de Policie*, ed. D. Bornstein (Heidelberg, 1977), 40, 166; cf. *The Book of the Body Politic*, tr. K. L. Forhan (Cambridge UP, 1994); Lewis, *Later Medieval France*, 89 n., 103 n., 267, 284, 289; Krynen, *L'Empire du roi*, 219–20.

should be chosen from *four* groups of estates (*manières d'estas*): from the nobles, firstly experienced captains to advise on the war, and secondly men of good sense and 'ordered estate' who have retained in memory what they have seen happen in their time in various spheres of life, understand differences of estates, times, and persons, and are the sort of people the prince should have in the household offices and advising him on what should be ordained for 'the noble estate royal'; thirdly, clerics and laymen whose legal training has given them the right to govern a polity and 'a community of all types of estates' in matters of justice and finance, as chancellors, masters of requests, bailiffs of great jurisdictions etc.; and fourthly, wise and prudent burgesses and others of large estate and good life, men who have had dealings with people of diverse estates and callings. The rest of the work was written towards the end of 1413, after the peace had broken down, and a movement for reform fostered by the duke of Burgundy and the university of Paris had culminated in a rising of Parisians under the butcher, Simon Caboche, which forced the dauphin to accept the people's choices in city offices. Part 2, about justice, calls for the punishment of evildoers. Part 3, on the good government of the people and *chose publique*, makes the presence of a prosperous bourgeoisie a sign that a city is *en bon estat*, and the keeping of 'all the estates of the policy in their degrees' a prince's 'great honour', but paints a lurid picture of the consequences of giving office to craftsmen without experience of matters of right and justice.<sup>70</sup>

Jean Gerson, the chancellor of the university of Paris, who gained international stature as advocate of a general council of the Church to resolve the papal schism, answered the crisis of the French kingdom with the ideal of the mystical body of the nation. Containing students from all the estates of the body politic, the university, he claimed, could represent the whole of France in saying *Vivat rex, vive le roy, vive le roy*, and teach the king how he alone could restore peace to his troubled land and to a divided Christianity. It seemed to Gerson, reflecting on 'the state of the king and his kingdom', that the enemy of mankind had sent his eldest son and ablest captain to destroy 'the civil life of the *chose publique* in head and members' and thus dissolve not only 'the state or royal lordship [*l'estat ou royalle seigneurie*]' but also each of the three estates which guarded and supported 'this sovereign estate [*cest estat souverain*]'. Clergy, *chevalerie*, and bourgeoisie must see that *l'ordre du corps mystique de la chose publique* was not subverted, defending their head and restraining luxury and *oultrageous estas* among their ranks, though they had a right to expect that the burden of taxes would be

<sup>70</sup> *The 'Livre de la Paix' of Christine de Pisan*, ed. C. C. Willard (The Hague, 1958), 75-7, 113, 123, 130-1, 135-6.

equally distributed through the mystical body. On one occasion Gerson tells the king that the knights (here called the first estate) are the strong arms which defend 'your mystical body' which is 'the royal polity [*regalis policia*]'; on another, that we may talk of 'the royal estate or dignity' as the king's second life, a 'civil or political' one, which is 'worth so much more than his physical life as, transmitted by legitimate succession, it is more permanent, and as the common good is more valuable than the particular or personal'. When it did more than give expression to an ideal unity of the different estates in French society, the notion of the body politic emphasized the dominance of the head from which all civil life flowed.<sup>71</sup>

The legitimate succession to the French crown after the expiry of the Capetian dynasty was of course the issue which started the Hundred Years War, and Charles VI's madness and Henry V's triumph at Agincourt in 1415 brought it to the forefront again. It was an issue to be settled, if not by force of arms, then by the arguments of lawyers rather than political theorists. In order to counter the Plantagenet claim through Edward III's French mother, the Salic law had been discovered which supposedly excluded succession to the Crown not just by females but also by descent through females, and this was proclaimed a fundamental law of the French polity in an *ordonnance* of 1374.<sup>72</sup> When in 1418 Duke John the Fearless of Burgundy seized control of Paris and the government of France, Jean de Terre Rouge (or 'de Terrevermeille'), a doctor of law and *avocat* from Nîmes, wrote a Latin treatise to confound the Burgundians 'as rebels against their kings' and to assert the rights of the dauphin, the future Charles VII. Kingship, he argued, was different from ordinary lordship, and succession to a kingdom different from hereditary succession to 'private things', which might be changed by the will of a testator. In the king's incapacity, the 'administration of the kingdom' should go to the eldest surviving son of the king, even though he was a minor, like the kingdom itself on his father's death: that was the custom in force in France 'as it was introduced by the consent of the three estates and the whole civil or mystical body of the realm'.<sup>73</sup>

<sup>71</sup> Jean Gerson, *Oeuvres Complètes*, ed. Mgr Glorieux, vii: *L'Oeuvre Française, Sermons et Discours*, 1137-9, 1144-7, 1149-51, 1178-9; Kantorowicz, *The King's Two Bodies*, 218-19; Lewis, *Late Medieval France*, 84-90.

<sup>72</sup> J. Krynen, *Idéal du prince et pouvoir royal en France à la fin du moyen âge, 1380-1440* (Paris, 1981), 281 ff.; Cazelles, *Société politique . . . sous Jean le Bon et Charles V*, 555-6, 579-81.

<sup>73</sup> For Terre Rouge see: R. E. Giesey, 'The French Estates and the Corpus Mysticum Regni', in *Album Helen Maud Cam*, Studies Presented to the International Commission for the History of Representation and Parliamentary Institutions, 23 (Pouvain, 1960), 157-71; J. H. Burns, *The Idea of Monarchy 1400-1525* (Oxford: Clarendon Press, 1992), 40-58. The first two of the three tractates of Jean de Terre Rouge's *Contra rebelles suorum regum* are

Terre Rouge might almost have been anticipating how events would shortly turn out. The killing of Duke John the Fearless in 1419 at a meeting with the dauphin on the bridge over the Seine at Montereau, though probably unpremeditated when it happened, had been approved by the lawyer in advance, as the tyrannicide of a usurper of royal authority and cruel enemy to the *rem publicam* and *bonum commune*.<sup>74</sup> But it only drove the Burgundians into an alliance with the English and opened the way to the Treaty of Troyes, by which Charles VI disinherited the dauphin, gave Henry V his daughter Katharine in marriage, and made his new 'dear son' the heir to his kingdom. The English and French crowns were to be forever united, and because the French king was 'hindered much of the time' from attending to the needs of his realm, Henry was to have the government of the *chose publique* of France straight away, upon agreeing to allow Charles the fiscal 'sustenance of his state', to rule by the counsel of the nobility and wise men, to uphold the authority of *parlement*, and to maintain Frenchmen in their rights. Henry was also to work to obtain the consent of the three estates of both realms to the treaty, so that their peoples might converse and trade together in real peace, and the English parliament roll duly records the summoning of the 'three estates, that is the prelates and clergy, nobles and magnates, and also the commons', to Westminster in May 1421 to approve the peace as the treaty required, and as they were told the French estates had approved it in Paris the previous December.<sup>75</sup>

But Terre Rouge argued that Charles VI could not 'alter those things that are ordained for the public state of the realm (*ea, quae ad statum publicum regni sunt ordinata*)'. Terre Rouge imported the organic metaphor to argue for a total obedience by subjects to their king; but he goes back to the notion of the *status regni* to imply (as J. H. Burns has argued) that this was nevertheless a 'constitutional' rather than an 'absolute' monarchy. The 'state of the realm' resurfaces in a clearly constitutional sense. What Gerson had called 'royal lordship' or *estat souverain* was subject to no political restraint, but it was subordinate to a 'state of the realm' according to which the king for the time being simply administered a Crown he might not trade, and which carried an

appended to the 2nd edn. of F. Hotman's *Disputatio de controversia successionis regiae* (Frankfurt, 1586): I have used the copy in the Advocates Library, Edinburgh, by kind permission of the Librarian; see fos. 23, 28, 31, 34, for the special character of succession to a kingdom.

<sup>74</sup> Hotman, *Disputatio*, fos. 49, 60–2, for Terre Rouge's condemnation of Burgundy as a tyrant.

<sup>75</sup> C. T. Allmand, *Henry V* (London, 1992), 135–54; *EHD* iv. 223–9; *Les grands traités de la guerre de cent ans*, ed. E. Cosneau (Paris, 1889); *RP* iv. 135.

overriding responsibility for the public good. The king, Terre Rouge repeats, exercises *administrationes publicae, regimina publica*.<sup>76</sup>

Jean Jouvenal des Ursins, historian of Charles VI's reign and archbishop of Rheims under Charles VII's, best expressed this 'moral constitution' of the French monarchy, which Jacques Krynen discovers first in the writings of Philippe de Mézières. The terrible devastation of the war with England and with themselves had made the French people seek security in submission to a king who was 'God on earth', but who might nevertheless be fiercely criticized for neglecting his duties to the community.<sup>77</sup> The support of most Frenchmen for the dauphin in his rejection of his father's transfer of the kingdom as an impossibility led eventually to Charles VII's recovery of both the Crown and English territorial conquests. But the Hundred Years War was won, and France was started on a century of growing prosperity and power with little contribution from a rarely convened and largely passive estates general. As the English were expelled it was with the estate of princes and nobles that the Valois kings found themselves in confrontation. Led by the great houses of Burgundy, Bourbon, Berry, Alençon, and Brittany, in 1465 the nobles took up arms against the much-hated Louis XI. Thomas Basin, the bishop of Oresme's old diocese of Lisieux, like Jean Jouvenal a lawyer by training but unlike him prepared to justify political resistance to a king of 'barbarous and inhuman character', gives a first-hand account of this self-styled 'League of the Public Weal' (*De conjuratione dicta 'du bien public'*) in which he was himself involved. 'Necessity and utility demanded that the state and order of the commonwealth be reformed for the better' (*reformari in melius reipublice statum atque ordinem evidentissima exposceret necessitas atque utilitas*). Opponents of the league say that it is not for subjects and vassals to take arms against their king and lord, or 'to wish to read him lessons', but 'we reply to them with a question: if they found themselves on a ship [the ship again!] and the captain, by incapacity or malice, was going to let his ship founder on Scylla or Charybdis, ought they to let him, or rather ought they (even if they were the captain's slaves) to exhort him to stop and, if he took no notice, act vigorously to stop him?'<sup>78</sup>

<sup>76</sup> Hotman, *Disputatio*, fos. 34, 40, 46; Burns, *The Idea of Monarchy*, 46–7, 158–9; Lewis, *Late Medieval France*, 88; Krynen, *Idéal du prince et pouvoir royal*, 298 ff.

<sup>77</sup> Krynen, *ibid.* 311, 326 ff.; EHD iv. 228; P. S. Lewis, 'Jean Juvenal des Ursins', in his *Essays in Later Medieval French History*, 169–87, and *Late Medieval France*, 64, 94–6.

<sup>78</sup> Thomas Basin, *Histoire de Louis XI*, ed. C. Samaran (Paris, 1963), i. 164–85; Philippe de Commynes, *Mémoires*, ed. Joseph Calmette, 3 vols. (Paris, 1924–5), i. 9 ff., 49 ff.; Lewis, *Late Medieval France*, 96, 342–4; *Essays in Later Medieval French History*, 108–9; J. R. Major, *Representative Institutions in Renaissance France, 1421–1559* (Madison: Wisconsin UP, 1960), 54–9; E. Le Roy Ladurie, *The Royal French State 1460–1610*, tr. J. Vale (Oxford: Blackwell, 1994): 63–6; *The New Cambridge Medieval History*, vii, ed. C. T. Allmand (Cambridge UP, 1998), 398–412.

The League's first aim, according to Basin, had been to compel the king to assemble the three estates in his capital to assent to 'laws and decrees' which the princes would make to restore the collapsing *respublica regni . . . in statum meliorem*. These ideas were expressed again at the estates general held at Tours in January 1484 after the death of Louis XI—the last full meeting before the Wars of Religion in the second half of the sixteenth century—which was reported in great detail (and no doubt edited to yield a message) by Jean Masselin, a deputy from the bailliage of Rouen who played a leading part in the proceedings. He has a Burgundian nobleman called Philip Pot declare that history had taught him how kings were originally set up for the common utility, and that 'the commonwealth belongs to the people [*republicam rem populi est*]'. The estates general did not exist merely to grant taxes—without its express or implicit assent no institution could be firmly established. The estates, Pot continues, had upheld Philip of Valois's rights against Edward III and assumed responsibility for the polity during King John's captivity and Charles VI's incapacity; did they not see that the strength and standing of the commonwealth [*reipublicae vigor et status*], or its ruin and overthrow, now depended on their asserting the right to nominate a council of regency. As Krynen has argued, Pot's rhetoric was in fact just another (though particularly vigorous) rendering of a scholastic commonplace, calculated to get the estates' support for a council of regency for the young Charles VIII which would be controlled by his sister Anne of Beaujeu and her husband in preference to the male princes of the blood, and the prevailing note at Tours was the traditional one of loyalty to the Valois monarchy. The French nation was declared to be renowned above all others for its devotion to its kings, whereas the English were always changing theirs: most recently Richard III had seized the throne, with the approval of the English people, after the death of Edward IV, and slaughtered (it must have been in the few months before the debate at Tours) Edward's two young sons.<sup>79</sup>

But a new tone was becoming detectable in the meetings of the estates general, and one which the government fostered: the deputies of the three estates were beginning to be understood as the joint representatives of territorial constituencies. In 1484 the bailiffs and seneschals received the letters instructing them to assemble 'the churchmen, nobles, burgesses and inhabitants' of their *bailliages* and see to the election of

<sup>79</sup> *Journal des États Généraux de France tenus à Tours en 1484 sous le Règne de Charles VIII rédigé en Latin par Jehan Masselin, Député du Bailliage de Rouen*, ed. A. Bernier (Paris: Documents inédits sur l'histoire de France, 1835), 1, 36–8, 42, 139–57, 164–70, 255, 329 ff.; J. Krynen, 'Réflexion sur les idées politiques aux États généraux de Tours de 1484', *Revue Historique*, 4e série, 62 (1984); id., *L'Empire du Roi*, 438–55; Ladurie, *The Royal French State*, 73–6.

one deputy (or in populous Vermandois and the *prévôté* of Paris, two deputies) from each estate, who should carry to the estates general the corporate *doléances* of their *pays*. The three orders are known in some cases to have elected the three deputies together, while in the bailliage of Senlis they elected just one—from the 'third or common estate'. Probably it was the reluctance of the churchmen and nobles to be merged with *l'estat commun* that allowed the council of the town of Tours to elect three *bourgeois* as the deputies for Touraine—but that election was ordered to be held again in accordance with the summons. Masselin's journal reveals the heated debate and procedural improvisation produced at Tours by the requirement that the three estates produce a common set of articles on what was needed for 'the good, utility and profit of the realm and the *chose publique*'. The drawing up of the first chapter on the clergy provoked a protest from some bishops that the other estates had no right to speak for the Gallican church and the equally forceful response that meetings of the estates were not ecclesiastical synods but held on the authority of the secular power to discuss the needs of the commonwealth (*reipublicae utilitas*): any bishops present should be there as deputies elected by the people of the *bailliages*. In March, as the meeting approached its end, the question as to whom the deputies represented was brought to a head by the demand that they be paid the expenses of their two-month stay at Tours. An advocate from Troyes argued that the poor people of the land should not have to pay for the rich deputies whom clergy and nobility exempt from *taille* sent to the estates general to transact their business, and it was now a noble who pointed out that no deputy was supposed to represent his order alone, and claimed that his estate along with the clergy had done more than grasping lawyer-deputies to keep down taxes and defend the interests of the poor.<sup>80</sup>

The understanding that the members of the estates general were elected to work together for the advantage of the one commonwealth (*unius reipublicae*) contributed to the territorial solidarity of France only at the provincial level, if at all. Certainly printing now allowed the *cahier des doléances* presented to the king and government by the assembly of 1484 to be 'published and disseminated everywhere'; and the chapter of the *cahier* put forward 'for the third and common estate' complained of the way the whole body of the realm had been drained of its life-blood by papal and royal taxes, by payment of the expenses of

<sup>80</sup> Masselin, *Journal*, 393, 407–10, 498–518, 643 (for the debate on the chapter on the church), 661–713 (appendices 1–2: the *cahier* of the three estates and the government's response); P. Viollet, 'Élection des députés aux États Généraux réunis à Tours en 1468 et en 1484', *Bibliothèque de l'École des Chartes*, 27 (1866), 31–2, 52–5; W. Blockmanns, 'Representation', in *New Cambridge Medieval History*, vii, 51, 62–3; Lewis, *Later Medieval France*, 366, for the argument over expenses.

the king 'for the state of his household and family', by the depredations of men-at-arms, and by the number of officers and pensions. But the country was too large for a political system centred on an estates general to be workable and there was little agreement at Tours between the groups of delegates (*legati*) from the various 'parts', 'provinces', and nations of the kingdom: Normans, Burgundians, the men of Aquitaine, and the rest, clashed bitterly over the constitution of the council of regency and the distribution of taxation.<sup>81</sup>

A divided estates general was neither a great asset nor a threat to royal government and could be dispensed with. Philippe de Commines, who had deserted the service of the duke of Burgundy for that of Louis XI and in his *Mémoires* provided a newly unmoralistic analysis of the politics he observed as councillor and ambassador, thought that the meeting of 1484 bore out the lesson of English politics (of which he claimed first-hand knowledge) that the body politic was best tended where princes explained the need of subsidies to assemblies of their subjects, and were thus restrained from embarking on costly adventures. But Commines saw politics very much from the king's side, understood Louis XI's loneliness and suspicion, and knew that royal power depended in both France and England on the satisfaction of the demand for 'offices or estates' and not putting the king's estate 'in peril of so uncertain a thing as a battle'. Answering the complaints of the estates in 1484 about the cost of the multitude of men-at-arms and officials, the chancellor complained that the king and the princes wanted the commonwealth to be in a state [*republicam . . . eo statu esse*] that was as perfect and peaceable as could be imagined: but soldiers were a vital arm of the body politic, and no one would say that spending on 'the state of the royal house and family' ought to be less than magnificent. He explained that Charles VIII could not return to Charles VII's level of expenditure (as the estates asked), for a young king must rely on the loyalty of others for the government of the commonwealth and so be liberal with rewards.<sup>82</sup>

In a more fundamental way the strength of the monarchy rested on the careful distribution of 'estates and offices' to individuals rather than on the management of corporate estates. By the appointment of office-

<sup>81</sup> Lewis, *Later Medieval France*, 8; for the chapter of complaints put forward for the third estate, see Masselin, *Journal*, 446, 669–80; for the general complaints about taxes, the army, officials and pension, *ibid.* 8, 330, 356, 390, 492, 584, 644–6; for Masselin's orations, *ibid.* 328–30, 362–82, 430; for the sections and 'nations', their disagreements and 'indignation', *ibid.* 66–8, 160–2, 398, 400, 410, 460, 506, 652; for the debate within the Norman nation, *ibid.* 518, 552–4, 580, 592, 624; Major, *Representative Institutions in Renaissance France*, ch. 4, provides a narrative of the proceedings of the estates general of 1484.

<sup>82</sup> Commines, *Mémoires*, i. 2, 50 ff., 65 ff., 129, ii. 8, 76, 211, 217 ff., 230–2, 288 ff., 311; Masselin, *Journal*, 334–6, 366–8, 384–8; Lewis, *Later Medieval France*, 108–9, 118; J. Blanchard, *Commines L'Europeen: L'Invention du politique* (Geneva, 1966), 286–97.



holders the government contributed to the complexity of society already evident in Philippe de Mézières' scheme of orders and estates, but also lessened anxiety about the maintenance of 'degree': hierarchy was divinely ordained, but it was always possible to rise through royal service, which acquired infinite gradations. Even among the old nobility the king exchanged the loyalty of feudal vassals for the military competence of subjects. In 1484 *l'estat de noblesse* asked and was granted that nobles should be paid when they were called to arms, 'each reasonably, according to his estate', but the request that they, rather than *baillis* and *sénéchals*, should lead detachments was refused. In 1537, Francis I appointed the dauphin Henri to the 'estate' of governor of Normandy, and in 1537 he provided Anne de Montmorency to *l'estat et office* of constable of France, as a man experienced in war and zeal for the affairs of the king, his realm, and the *chose publique*.<sup>83</sup>

Among the civil servants, lawyers, and urban elite a new caste was created, leading into another nobility 'of the robe'. The group 'privileges and exemptions' now most prominently granted and confirmed by royal ordinances were those of the 'clerks and secretaries of the king, house and crown of France'. In 1482, Louis likened his re-establishment of his clerks as a fifty-nine strong collegiate body (*en l'estat et communauté de corps et collège*), with himself as head and sixtieth member, to the action of Christ, King and Prince of Kings, in appointing 'the glorious evangelists' to record his commandments and works 'by solemn writing and attestation', and to the papacy's appointment of prothonotaries to register the deeds of the martyrs and the decrees of the church. In the same way his predecessors had appointed clerks to register the things established by the kings of France: laws, constitutions, pragmatic sanctions, edicts, ordinances, consultations, charters, gifts, privileges, provisions of justice or of grace, the judgments of the courts of *parlement* and other courts of sovereign authority and jurisdiction, and generally all letters touching the king's most weighty, special, and secret affairs. Because of the great profit and utility they provided 'to the whole state of the commonwealth, in the doing of justice and otherwise', Louis's clerks and secretaries were to be raised to particular 'privileges, estates, dignities and prerogatives' above those of other officials, enjoying security of office for life and not requiring new commissions when there was a new king—though Charles VIII did promptly confirm this *anoblissement* on his accession.<sup>84</sup>

<sup>83</sup> Masselin, *Journal*, 643, 647; *Ordonnances des Roys de France: Règne de Francois I*, viii. 1536–7 (Paris, 1963), 99–101, 203–8; *Ibid.* ix: 1538–9 (Paris, 1973–5), 40–5; Lewis, *Later Medieval France*, 167–9, 185, 220ff.; *Essays in Later Medieval French History*, 12ff.; B. Guenée, *States and Rulers in Later Medieval Europe*, tr. J. Vale (Oxford, 1985), 158–60.

<sup>84</sup> *Ordonnances des Roys de France*, xix. 62–79, 473–5; *Ordonnances des Rois de France: Règne de Francois I*, viii. 22–6, ix. 207; Lewis, *Later Medieval France*, 177–83.

In 1515, French society could be understood as conforming to the secular pattern of society recognized in Italy, in which the estates were 'the nobility, the middle people which might be called the rich people, and the lesser folk'. There was 'an unbelievable number of offices and charges', such as governorships of provinces and captaincies of towns to sustain the old nobility, and the offices of finance and most of the offices of justice, which belonged to 'the middling estate'; the vocation of the third estate was 'the mechanical arts'. But by securing 'grace and privilege from the prince' (and considerable expenditure) men could rise from one estate to the next. The clergy, who could be regarded as 'common to all the estates', were offered many opportunities to advance in status. The king demanded a part in the appointment of ecclesiastical dignitaries because he took so many of his ministers from their ranks and paid them with benefices in his gift.<sup>85</sup>

Within the social hierarchy royal ordinances defined a tauter hierarchy of officialdom which drew the commonwealth together territorially in a way meetings of the estates general could not. In the second half of the fifteenth century, as Valois authority was restored and extended, *parlements* at Bordeaux, Grenoble, Dijon, Rouen, and Aix-en-Provence, each with 20 to 30 judicial councillors, were added to those of Paris and Toulouse. In 1539 conquered Piedmont was given a *parlement*. This was *not*, as it has sometimes been represented, a 'decentralization of justice and administration': it was rather a concomitant of the establishment of fixed centres of government and an extension of the Parisian style of administration to the provincial capitals of France, along with the appointment of *lieutenants généraux* or governors of provinces for the king. Royal government dealt directly with provincial estates over taxes, prohibited foreign lords to sit in the *assemblées publiques* of Provence, granted privileges to merchants of Languedoc at the instance of the estates and to the cloth workers of Tours 'for the utility of the *chose publique*', and laid down the procedures to be followed in Brittany in civil and criminal justice.<sup>86</sup> A series

<sup>85</sup> Claude de Seyssel, *La Monarchie de France et deux autres fragments politiques*, ed. J. Poujol (Paris, 1961), 120 ff.; *The Monarchy of France*, tr. J. H. Hexter and M. Sherman, ed. D. R. Kelley (Yale UP, 1981), 58–66 (part 1, caps. xiii–xix); R. Mousnier, 'Les Concepts d' "ordres", d' "états", de "fidélité" et de "monarchie absolue" en France de la fin du xv<sup>e</sup> siècle à la fin du xviii<sup>e</sup>', *Revue Historique*, 247 (1972), 298–9; Lewis, *Later Medieval France*, 169–70, 176–7, 319; Guenée, *States and Rulers in Later Medieval Europe*, 168–9; Ladurie, *The Royal French State*, 21 ff.

<sup>86</sup> *Ordonnances des Roys de France*, xvii. 6–7, 18–20, 332–4, 402–4, xviii. 252, 268, xx. 592; *Ordonnances: Règne de François I*, viii. 112–15, 141–73, ix. 84–8, 176–83, 322–9, 333–40; F. Lot and R. Fawtier, *Histoire des institutions françaises au moyen âge*, ii. *Institutions royales* (Paris, 1958), part iv, caps. v ('Personnel') and xiii ('Grands Jours et Parlements Nouveaux'); G. Dupont-Ferrier, 'L'Emploi du mot 'Province' dans le langage administratif', and 'De quelques synonymes du terme "Province"', *Revue Historique*, 160 and 161 (1929), 241–67 and 278–303; A. Bossuat, 'La Formule "Le Roi est empereur en son

of ordinances required that the customary law of the different parts of France be written down and published, so that (as the *cahier* of the estates general had asked in 1484) litigants would no longer have to prove the relevant customs in particular disputes and that all the law of the country might be known. The three estates of every bailliage and jurisdiction were to be summoned to oversee the drawing-up of their customs and to refer difficulties they found impossible to resolve to be decided by the *parlement* of Paris, for without settled justice 'realms, monarchies and political communities' could not survive.<sup>87</sup>

Justice was held up as the cement of the realm. The king appointed *baillis* and other judges in the *pays* to exercise 'their estates and offices' in the doing of justice within limits which he defined, and was repeatedly called upon by the corporate estates to remove unjust officials.<sup>88</sup> In 1484 the estates general were told that the king wished them to live in 'peace, polity and justice', and there was a separate chapter of the *cahier* beginning with what became a standard formula: justice was the highest (here the *dame et princesse*) of the virtues, 'without which no monarchy or commonwealth could be maintained in felicity and prosperity'. That and the succeeding chapter on trade (*La Marchandise*) were much concerned with the choice of officials and the enforcement of *ordonnances* regulating their behaviour.<sup>89</sup> In the act of appointing a president and councillors for the Norman *parlement* in 1497, Charles VIII exalted justice as the virtue by which kings reigned, 'realms, principalities and monarchies' were maintained, and subjects were ruled in peace and union, 'each in his estate'. The *parlement* of Paris was conscious of its special authority and permanence, yet King Louis XII was careful to confirm its membership immediately on succeeding his nephew in 1498, using the same formula about the supreme importance of justice. Louis, a king who was hailed at his death as 'the Father of Justice', moved constantly around the provinces (the creation of a road system centred on Paris was the first essential of administrative centralization); and he continued Charles's project of establishing the Great Council as a proper court which the king could use to 'act over the head of the *parlements* in matters that were

royaume": Son Emploi au xv<sup>e</sup> siècle devant le Parlement de Paris', *Revue historique de droit français et étranger*, 4th ser. 39 (1961), 371–81, and B.-A. Pocquet du Haut-Jussé, 'Une Idée politique de Louis XI: la sujétion eclipse la vassalité', *Revue historique*, 226 (1961), 383–98: both tr. in *The Recovery of France in the Fifteenth Century*, ed. P. S. Lewis (London, 1971); B. Chevalier, 'The *bonnes villes* and the King's Council in Fifteenth-Century France', in *The Crown and Local Communities*, ed. J. R. L. Highfield and R. Jeffs (Gloucester, 1981).

<sup>87</sup> *Ordonnances des Roys de France*, xx, pp. v, 431–5, xxi. 6, 18, 332, 402; *Ordonnances: Règne de François I*, ix. 350–6, 413–17.

<sup>88</sup> *Ordonnances: Règne de François I*, viii. 104–12; ix. 413–17; Guenée, *States and Rulers*, 354–5; Ladurie, *The Royal French State*, 82, 89, 100, 202–6.

<sup>89</sup> Masselin, *Journal*, 166, 186, 242–4, 680.

especially sensitive, or in the national interest', and to take the initiative in changing the law.<sup>90</sup>

The first printed collections of *ordonnances* were issued in Louis XII's reign, and there was an acceleration in the issuing of *grandes ordonnances* which changed the law on account of 'the variety and changeableness of the times'. The great ordinance of March 1499 on 'the justice and police of the realm' claimed that France was at all times 'better ruled and governed than any other monarchy in justice', which was the first of the cardinal virtues and 'the principal and most necessary part of well-conducted monarchies, realms and principalities'. The king's predecessors (the *ordonnance* went on) had acquired the name of 'most christian princes' (*princes très-chrestiens*) by their willingness to spend more money than all other rulers on employing 'in all the quarters and provinces of this realm a great number of officers of justice', and Louis had now assembled at Blois some prelates, the presidents and councillors of his courts of *parlement* of Paris, Toulouse, and Bordeaux, some *baillis*, the chancellor, other ministers, and the members of his *grand conseil* to establish ordinances to ensure that his subjects continued to be ruled by *deue justice et police*.<sup>91</sup>

The jurisdiction of *parlements* and *baillis* extended to so many aspects of the French polity, including commercial privileges, municipal finances and the liberties of the church, that the *ordonnance* needed 162 clauses. The freedoms of the Gallican church from papal rule under the pragmatic sanction of 1438 were to be enforced, universities were instructed to give degrees only to the meritorious, and royal justices to confirm in benefices only those who properly registered their degrees (cc. 1–12). The procedures to be followed by commissioners to take evidence from witnesses in civil cases were regulated (cc. 13–21), as were those for the enforcement of mercantile debts (cc. 142 onward), and merchants were also permitted to make common purses (i.e. set up funds) to protect merchandise carried on navigable rivers, where lords and gentleman were every day imposing new tolls (c. 81). Criminal procedures were tightened up (cc. 62 and following). Second offenders and vagabonds were to be dealt with summarily (c. 90), and registers of prisoners to be kept (c. 103). The application of judicial torture was to be recorded scrupulously—the clerk of the court must attend to note the names of the sergeants and others present, the form of the question put to the prisoner, how much water he was allowed and how many times he underwent the torture, and his response, perseverance, resolution, or

<sup>90</sup> *Ordonnances des Roys de France*, xx. 577–86, xxi. 4, 21, 56; Lot and Fawtier, *Institutions royales*, 78–9.

<sup>91</sup> *Ordonnances des Roys de France*, xxi. 177–207; Lot and Fawtier, *Institutions royales*, 352–4; *New Cambridge Medieval History*, vii. 415–16.

wavering; the following day the same question should be put again, away from the place of torture, to see if he stood by his answer, but he could not be tortured again without new charges (*indices*) (cc. 113–14).

Running through the whole ordinance are strictures on the behaviour of *parlementaires*, *baillis*, and court officials, who were not to take pensions from lords or demand payments from litigants before them (cc. 22, 33). The presidents and councillors of *parlements* were told (to their consternation) that they must be chosen openly (*publiquement de vive voix*) and not by secret ballot, and be examined for sufficiency by a committee of councillors before the king would appoint them (cc. 30–2); revealing the secrets of courts (on the other hand) was to be punished (c. 39). A father and son were not to sit as judges in the same court, nor two brothers (c. 41); the lieutenants of *baillis* must not buy their offices, but be doctors of laws chosen in full court (cc. 47–9); the king's secretaries must swear not to charge for a simple signature on official letters (c. 138). The power assumed by royal lieutenants and governors to grant 'graces, remissions and pardons . . . ennoblements and legitimations, and to call before them cases pending before ordinary judges' was revoked, because it belonged to the king as a sign of his sovereignty (c. 70). All judges and officials were to take an oath to enforce the Grande Ordonnance, which was to be published by the Grand Conseil, the *parlements* of Paris, Toulouse, Bordeaux, Dijon, Grenoble, the *grand sénéchal* of Provence, the *prévôt* of Paris, and all *baillis* (c. 162).

Machiavelli's *Prince* (written in 1513) was in the tradition of the treatises *De regimine principum* not least in placing in the forefront of his argument an Italian view of French government, which the Florentine had gained on three diplomatic missions to France in the first decade of the sixteenth century. All states (*tutti li stati*), all the dominions over men there had ever been, were either republics or principalities, and France was obviously a leading example of the latter, but its experience showed that a kingdom was also a commonwealth which must be ruled politically (that is, by 'policy') in order to survive and flourish. As Machiavelli would say in his *Discourses on Livy* (1515–17), one's country was to be defended by any means available, and the French should be followed in their belief that nothing could be shameful in preserving the power of their kingdom. But faithlessness between princes should not extend to faithlessness between prince and people, and the successful ruler must avoid being hated and despised. In France he had achieved this by calling into existence an 'infinite number of good institutions' (*infinite costituzione buone*), above all *parlement*, which restrained the nobility to the advantage of the people without the odium falling on the king. In the *Discorsi*, a compendium of his (not

always consistent) political ideas, Machiavelli idealized the ‘ancient institutions’ (*ordini antiche*) of France to an extraordinary degree. This kingdom more than any other was governed by laws and ordinances (*leggi ed ordini*), which the *parlements* were there to defend. The *parlement* of Paris in particular stood up to the nobility and judged the actions of the king himself; if it lost its pertinacity in doing so, the realm would disintegrate. Security as much as freedom was what most people wanted, and in France they were made to feel secure by the king’s pledge to apply its numerous laws to himself. He who first ordered the French state (*chi ordino quello stato*)—presumably Charlemagne—had intended that its kings should observe its laws, while having a free hand in the use of arms and of finance.<sup>92</sup>

Claude de Seyssel, a Savoyard jurist who became a counsellor of Charles VIII and Louis XII, a *parlementaire* of both Toulouse and Paris, bishop of Marseilles and ultimately archbishop of Turin, writing his *Monarchie de France* for the new King Francis I at the same time that Machiavelli was composing his *Discorsi*, saw French royal authority as ‘not totally absolute nor yet too much restrained, but regulated and bridled by good laws, ordinances, and customs’. Of the three, religion was predictably put first, and after it justice, which was of ‘greater authority in France than in any other country of the world we know of, especially on account of the *parlements*’; these were ‘instituted chiefly to bridle the absolute power that kings might want to use’ and ensured justice against both king and subjects in civil matters. The third bridle was polity (*police*), that is the ordinances made by kings ‘which tend to the conservation of the realm in general and in detail’, and have been kept so long that kings themselves could not derogate from them. Particularly important were the laws concerning royal domain, which could not be alienated without the approval of the sovereign courts, for its depletion forced the king to burden his people with extraordinary taxes. The monarch’s role was to guard the laws, ordinances, and praiseworthy customs of France concerning *la Police*, by which the realm had been brought to such glory and power. To complete the discussion of this topic, ‘which is the most difficult one to unravel’, Seyssel defines *Police* as the harmony of the *Monarchie de France*, which exists when subjects from all the estates are maintained in common accord

<sup>92</sup> Niccolò Machiavelli, *Il Principe*, caps. 1, 19: pp. 51, 143 in Mario Puppo’s edn. of the *Opere Politiche* (Florence, n.d.) and pp. 5, 66 in the English translation by Quentin Skinner and Russell Price (Cambridge UP, 1988); *Discorsi sopra la prima deca di Tito Livio*, book I, caps. 16, 19, 55, 58, III, caps. 1, 41: pp. 254, 264, 347, 356, 502–3, 630 in the *Opere Politiche*, ed. Puppo, and pp. 255, 264, 333–4, 341–2, 463–4, 573 in the English tr. by Leslie J. Walker in vol. i of his *Discourses of Niccolò Machiavelli*, 2 vols. (London, 1950); cf. Walker, *Discourses*, ii. 41–2, for Charlemagne as the ‘founder’ of France; J. R. Hale, *Machiavelli and Renaissance Italy* (London, 1961), caps. 3, 6, 7, 8; J. H. Whitfield, *Discourses on Machiavelli* (Cambridge: Heffer, 1969), caps. 8–9.

and individual contentment, for from discord would follow the ruin of the monarchy and the dissolution of the mystical body.<sup>93</sup>

The rhetoric of the kingdom maintained by justice and laws may have been remote from the actual brutalities of political life, but its ubiquity and persistence reflected a basic need to believe in a commonwealth with an ordered constitution. As it was understood at the end of the middle ages, this can no longer be called a feudal constitution—the liberties of the landed aristocracy had been far too tightly constrained within the scheme of estates. 'King and kingdom', *respublica* and *policie* could be used, as they were by the chancellor and others in the estates general of 1484, to refer to the entity which historians of the nineteenth and twentieth centuries habitually translate as 'state'. The acts of Francis I have '*respublica gallica*', 'l'état de chose publique' (the time-honoured *status reipublicae* converted to the vernacular), 'nos affaires et affaires publiques', and the '*chose publique*' or '*la couronne et chose publique* of our said realm'.<sup>94</sup>

France was being called a 'monarchy and *chose publique*' in royal acts well before Seyssel discussed the best form of regime in good humanist tradition and concluded that it was 'l'État monarchique': there were imperfections even in 'the aristocratic state and government of the Venetians', though by reason of its laws and customs that was 'the best policed empire and state of community (*mieux policé empire et état de communauté*) one has seen or read about up to now'. Seyssel's state seems to be both the regime and 'the mystical body of human society' that is born of 'a civil and political union' and like a natural body goes through the five ages of childhood, youth, manhood 'which is the state [?proper]', age, and decrepitude. Used of an extensive monarchy like France, where government had grown in symbiosis with territorially dispersed organs of justice and administration, 'state' had come to mean regime *and* commonwealth together. The State thus existed in its own right, no longer having to be 'of the king' or 'of the kingdom', though it could always be characterized by its type of regime (as in 'the monarchic state'); whether the emphasis was on the ordered community or the government that ordered it depended on context.<sup>95</sup>

To that extent 'the state' would always be an ambiguous term, as it was sometimes even in *The Prince*. A sense of the state as a territorial community creeps in when Machiavelli contrasts France and Turkey as

<sup>93</sup> Seyssel, *La Monarchie de France*, ed. Poujol, 18, 115–19, 154–5; *The Monarchy of France*, tr. Hexter and Sherman, 49–57, 93–5, 182 (part 1, caps. viii–xii, part 2, cap. 17); Rubinstein, 'The History of the Word *politicus*', 52–5.

<sup>94</sup> Masselin, *Journal*, 48–9, 166–7, 186–7, 334–6, 366–8, 380–1, 386–7; *Ordonnances: Règne de François I*, viii. 139, 351; ix. 6, 207–8, 294.

<sup>95</sup> Seyssel, *La Monarchie de France*, 107–11: tr. in *The Monarchy of France*, 42–6 (part 1, caps. iii–iv).

representatives of the two types of government into which he thinks all principalities are divided. *Lo stato del Turco* is difficult to seize because it is divided into sanjaks administered by servants who are entirely the creation of the sultan, but by the same token it is easy to hold once captured. On the other hand, *lo stato di Francia* is easy to take, because the king of France is placed in the middle of a host of hereditary lords with their own 'subjects' and recognized 'state', and some of these barons can always be won over by an invader: but equally they can change their allegiance back again, so that France is difficult to hold. Machiavelli is clearly looking back to the events of the Anglo-French wars, the outcome of which he describes more optimistically when he discusses 'mixed principalities'. Conquered territories can be integrated with 'an old state', if their language, way of life, and institutions are similar, and if the conqueror changes their governors but not their customs: this he believes explains the permanence of the French annexation of Burgundy, Brittany, Gascony, and Normandy, and the failure of Louis XII to hold on to Milan.<sup>96</sup>

<sup>96</sup> Machiavelli, *Il Principe*, caps. 3, 4: pp. 58–9, 71–2 in *Opere Politiche*, ed. Puppo, and pp. 8, 15–16 in the tr. by Skinner and Price.



## CHAPTER NINE

# From Law to Politics: The Genesis of 'the Modern State'

BY THE end of the middle ages the expansion of royal government from its base in the administration of justice had identified the state of the commonwealth with the state of the king. A number of factors would then start to detach the idea of the state from both legal order and specifically monarchical rule. The comparison and criticism (largely by lawyers) of different countries' laws and institutions, and a search for the best and most durable state of a commonwealth, were fostered by ancient rivalries like that between England and France, and by the widespread religious strife of the sixteenth century. In the course of the Reformation monarchical states took on moral responsibilities (e.g. for the relief of the poor) which had previously belonged to the Church, but they faced new challenges to their legitimacy from religious sects. The wars of religion bred a conviction in some jurists that the one essential requirement for the stability of a commonwealth was rule by a sovereign, who need not be an hereditary prince, but must have absolute power to make and unmake law. Such an insight might be termed a 'fundamental law', but this was the time when the model of 'the state of the commonwealth' began to be transformed from a country's legal heritage to its political institutions, for arguments about sovereignty formulated in legal terms proved to be resolvable only by the violent exercise of power. King James the Sixth of Scotland and First of England provides an example of a king who attempted to forge a new state, in this case out of the laws of his two kingdoms, but he was frustrated by the opposition of both countries' parliaments, and helped to provoke the temporary overthrow of monarchy in Britain. If 'the modern state' is anything more than the body politic in an arbitrarily demarcated 'modern' period of history, it must be the state that came into being in the religious conflicts of the sixteenth and seventeenth centuries, when it lost the qualifications 'of the king' and 'of the kingdom'. It was thus left a permanently ambiguous concept signifying either the whole commonwealth *or* the sovereign authority which gave the commonwealth its laws and transacted business with other 'sovereign states' on its behalf.

COMPARING AND CRITICIZING STATES OF  
COMMONWEALTHS

In later medieval and early modern Europe war and diplomacy fostered the comparison and criticism of the laws and institutions of individual commonwealths and a sense of their distinctive histories. The comparison of constitutions appears already in Philippe de Mézières's allegorical pilgrimage to test the moral currency of European kingdoms and city-states. During the Hundred Years War Frenchmen and Englishmen made propaganda out of the workings of each others' polities, especially (since the royal will was their very foundation) the fortunes of their kings, the French (for instance) labelling the English as habitual murderers of their rulers as well as disturbers of other nations' peace.<sup>1</sup>

It is true that from 1327 to 1649 Englishmen killed kings whom they did not know what to do with, once they had deprived them of their 'state' for misgovernment, for to keep alive a captive king invited the fate of Simon de Montfort. But in fact the political commentators of fifteenth-century England absorbed the royalism of French writers. Thomas Hoccleve, a high-living clerk in the privy seal office at Westminster who drew on the doctrines of Giles of Rome in his *Regiment of Princes*, a work in English verse he completed in 1411, begins by lamenting his personal ill-fortune, but then remembers how 'not long ago | Fortune's stroke down-thrust estate royal' (in the person of Richard II).<sup>2</sup> In the course of the fifteenth century the French political tract of 1347 was put into English as *The III Consideracions Right Necesserye to the Good Governauce of a Prince*, and Christine de Pisan's influential work of 1406–7 was translated as *The Body of Polycye*.<sup>3</sup> Around 1436, a work called *The Libelle of Englyshe Polycye* introduced a new theme: it proclaimed the command of the sea, 'which of England is the round wall', to be as vital as good governance at home, if an English ruler was to keep the realm in peace and any foreign prince from making 'fade the flowers of English state'. No one had been able to withstand the 'majesty' of the Saxon king Edgar, whose 'labour for the public thing' had added the construction of a great navy to the enforcement of the 'right and laws of his land'—a combination of good policies the writer believed was shown again by Henry V, that recent king 'of most estatly magnanimity'.<sup>4</sup>

<sup>1</sup> P. S. Lewis, 'War Propaganda and Historiography in Fifteenth-Century France and England', *TRHS*, 5th ser. 15 (1965).

<sup>2</sup> *Selections from Hoccleve*, ed. M. C. Seymour (Oxford: Clarendon Press, 1981), 30.

<sup>3</sup> *Four English Political Tracts*, ed. Genet, 174–219; *The Middle English Translation of Christine de Pisan's Livre du Corps de Policie*, ed. D. Bornstein (Heidelberg, 1977).

<sup>4</sup> *The Libelle of Englyshe Polycye*, ed. Sir George Warner (Oxford: Clarendon Press), lines

The language of the late medieval English Parliament Rolls reflected the same exaltation that is found in French writers of a kingship exercised for the good of the whole community. The record of the chancellor's initial 'pronouncement' and sermon might describe the business of a parliament as provision 'for the state and defence [*pro statu et defensione*] of the kingdom of England and the English church [*ecclesiae Anglicanae*]', and contain lectures on 'royal majesty', the obedience due to the king, and the different sorts of law (of nature, nations, and the gospel; Mosaic, civil, and canon). And it would repeat injunctions to sustain the king's 'high and royal estate', and to keep the peace and duly execute the laws of the land, 'without which no realm or country can long be in prosperity'.<sup>5</sup>

In the fifteenth century, 'commonwealth' became established as the favourite term for polity in the English vernacular, which it would remain down to the actual establishment in the seventeenth century of 'a Commonwealth and Free State' without any king or House of Lords.<sup>6</sup> John Gower's huge philosophical poem, *Confessio Amantis* (written in English, despite its Latin title, and probably between 1386 and 1390, though it exists in versions dedicated to both Richard II and Henry IV) sets out in book seven the three divisions of philosophy as Aristotle explained them to Alexander the Great, and under the third division (*Practique*) has a discussion of the ethics, economics, and 'policy' of kingship. Gower emphasizes that rule should always be for the 'common profit', a phrase which is taken straight from French and indeed appears in French in the declaration in Henry IV's first parliament that the king wished especially to have the Commons' advice and assent for the making of statutes, grants, and subsidies, and all such things as were to be done *pur commune profit du Roialme*. It appears again in 1414 in Henry V's first parliament, when the Commons presented (in English) a crucial claim that the king should grant or refuse their petitions without altering them, and the king is recorded as asserting that the statutes of that parliament were made by the advice and assent of the lords and 'at the request of his Commons', for 'the state of Holy Church and of the Realm' and for 'the Peace and *la commune Profit*'.<sup>7</sup>

1-3, 46-7, 885-6, 897-913, 1002-3, 1041, 1092-5; J. Watts, *Henry VI and the Politics of Kingship* (Cambridge UP, 1996), 16 ff.

<sup>5</sup> RP iv. 3, 15, 34, 62, 94, 106, 116, 123, 129, 150, 169, 197, 210, v. 214, 239, 278, vi. 3, 167, 196, 458.

<sup>6</sup> *The Constitutional Documents of the Puritan Revolution*, ed. S. R. Gardiner, 3rd edn. (Oxford: Clarendon Press, 1906), 388.

<sup>7</sup> John Gower, *Confessio Amantis*, ed. R. A. Peck (New York, 1968), 368-414; R. A. Peck, *Kingship and Common Profit in Gower's Confessio Amantis* (Southern Illinois UP, 1978); *A Concordance to John Gower's Confessio Amantis*, ed. J. D. Pickles and J. L. Dawson (Woodbridge, 1987), 486-7; RP iii. 427, iv. 22.

'Common weal' (i.e. common well-being) was the synonym found in the parliamentary petitions which moved into English in the first half of the fifteenth century for what had earlier been called variously *bien commun*, *le bien du Roialme et ease de le poeple*, *commune profit*, *chose publique*, and in the chancellor's Latin could still be termed in a parliament of Henry VII *Respublica* or *Regno publicum et commune bonum*. In 1447 a group of London parsons petitioned the Commons in parliament about a lack of schoolmasters in the city, which was 'the common concourse of this land', for where teachers were few 'the masters wax rich in money, and learners poor in cunning, as experience openly shewith, against all virtue and order of *well publik*'. One of the accusations that brought down Henry VI's leading minister, the duke of Suffolk, in 1450 was that he had betrayed to the self-styled king of France 'the privitees of your Council, as well of this your Realm for the common weal of the same' as of the governance of Henry's realm of France. David Starkey has pointed to the use of the rhetoric of 'commonwealth' (an alternative form of 'common weal') in the crisis of Henry VI's kingship and the duke of York's attempt to put royal governance to rights.<sup>8</sup>

Only the language of commonwealth was new, however: this was no more the first 'age of reform' than was Elton's 'Tudor revolution in government', but stands in the line of attempted reforms of 'the state of the king and the kingdom' stretching back to the baronial movement of the mid-thirteenth century and Thomas of Lancaster's criticism of the state of Edward II's household. Indeed, 'state' in its concatenation of meanings comes into the English language at the same time as 'commonweal'. Gower refers to 'the kinges hihe astat', that which 'to a kinges stat belongeth' and the 'good astat' of his reign, and believes that the stars control, in peace and in war, 'the stat of realmes and of kinges' (the latter phrase reversing the traditional order of priority). The final lines of *Confessio Amantis* exhort every 'staat in his degree' to work for peace and the chivalry (the knights) to defend 'the comun right', and call on the 'astatz' of the towns to be amended; none of which is possible without the efforts of the 'stat . . . | Above alle othre on erthe hiere' (i.e. the king), who must first learn to 'kepe and reule his owne astat' and live in dread of the king of heaven.<sup>9</sup> In 1450 Suffolk denied all the accusations made against him 'touching the King's high person, and the estate of his realm'; and the Commons, alarmed at 'the state' of Henry VI in terms of the grievous indebtedness which had been

<sup>8</sup> RP iii. 577a, iv. 129, 154, 159, 249, v. 121, 137, 178, vi. 267; D. Starkey, 'Which age of reform?': ch. 1 of *Revolution Reassessed: Revisions in the History of Tudor Government and Administration*, ed. C. Coleman and D. Starkey (Oxford: Clarendon Press, 1986).

<sup>9</sup> *Confessio Amantis*, book v, line 3335, vii, lines 646, 3010, 3136, 4245 etc., viii, lines 2971-3172.

reported to them and convinced of the need to relieve his 'high estate', petitioned for an Act of Resumption of royal grants of estates of land and offices, whether in fee simple or in fee tail, for life or for years.<sup>10</sup> However, in the debate about Henry's sickness and the land's misgovernment in 1454, 'the King's welfare and his Royal estate' is coupled with 'the common weal' rather than the state of the kingdom, and in 1467 in Edward IV's address to the Commons and in the preamble to another Act of Resumption 'the common weal, defence, surety and welfare of this Realm' is juxtaposed to 'the honour, state and prosperity of the King', who proclaimed his intention to 'live of his own' and impose taxes only 'in grete and urgent causes' concerning his subjects' *wele*.<sup>11</sup>

The displacement of 'state of the realm' by 'commonwealth' in the rolls of parliament accompanies the increased importance given the representatives of the shires and towns by the magnates' use of them in political struggles with the king, and the measure of initiative the Commons gained for themselves in those matters 'called common', that is the granting of taxes and the making of statutes which guarded 'common right', the 'common law', 'the good of your said Commons', and 'the state and integrity of your Crown [*l'estat et droiture de vostre Coroune*]'. The polity appears as a relationship of king and estates in treatises on the workings of English institutions written during the 'Wars of the Roses', the dynastic struggle between the families of Lancaster and York, their author Sir John Fortescue, the chief justice of England from 1442 until Edward IV's seizure of the throne from Henry VI in 1461 and chancellor to Henry in exile in Scotland and France, but a member of King Edward's council within a few months of the Yorkists' final victory in 1471. The English treatise 'On the Governance of England' which Fortescue may have written originally for Henry VI's son, views the polity through ideals of good government rather than commonwealth—of what was called in the parliament rolls *bonus regimen et gubernatio Regni*, or the 'politique and restful rule of the said land'. The cause Fortescue alleged for England's misgovernment, the poverty of its kings in contrast to the great revenues of their French counterparts, he explained in terms of a different relationship between king and estates in the two countries: the ability of the French king to increase 'impositions on the commons without the assent of the three estates' stemmed from the emergency of the Anglo-French war, when money had to be raised for defence but English incursions prevented the estates-general from meeting.<sup>12</sup>

<sup>10</sup> *RP* v. 183–4.

<sup>11</sup> *Ibid.* v. 241–2, 572.

<sup>12</sup> *Ibid.* iii. 433, 612, iv. 34, 173, 197, v. 241; Sir John Fortescue, *The Governance of England*, ed. C. Plummer (Oxford: Clarendon Press, 1885), 94–6.

In every respect except royal finances the contrast Fortescue drew from his unique ability to set the government of the France of Louis XI and Commynes alongside England's is to the disadvantage of the French polity. The theoretical framework for his argument in the *Governance*, the distinction taken explicitly from Aquinas and his followers between merely 'regal rule' (*dominium* [or *jus*] *tantum regale*), and 'political and regal rule', also shapes the two Latin treatises in which he had earlier tried to analyse the needs of government, the *Opusculum de Natura Legis Naturae* of 1461–3, and his most popular work, *De Laudibus Legum Anglie*, written in the years 1468–71 and printed many times from 1546. In the work on the Law of Nature the doctrines of Aquinas and Giles of Rome are combined with the lessons of ancient history and experience to show that English government is both political and royal, for the king does not make laws or impose subsidies without the consent of the three Estates of the Realm in Parliament, nor can subjects make laws without the authority of a prince whose dignity descends by hereditary right. Though the royal state (*statum regium*) was created by the law of nature without regard to its justice, a king governing politically and constrained by the laws of his kingdom to just judgment should see himself as enjoying no less power and liberty than a king governing royally, who is a slave to flattery and passion. He must nevertheless be prepared (again following Aquinas) to govern *regaliter* in emergencies and to dispense from custom and statute as mercy and equity require. In the latter part of the *De Natura* Fortescue proceeds from the discussion of the origins of royal power to nominally theoretical but certainly topical chapters on the law of succession to kingship as a public office, treating as a matter of legal right what the judges had in practice refused to rule upon when the duke of York claimed the throne in 1460. (The judges had said that, because the question 'touched the King's high estate and regality', it was 'above their law and passed their learning'.)<sup>13</sup>

*In Praise of the Laws of England* fills out the argument of the earlier work with vivid detail. A king has no right to change the laws of the body politic or deprive the people 'of their own substance uninvited or against their wills . . . just as the head of the body physical is unable to change its nerves'. The laws of France are stigmatized as those of a kingdom ruled entirely regally and based on the civil law of Rome rather than home-grown customs and statutes, which means that people are condemned to death on the strength of confessions extracted by torture

<sup>13</sup> *Governance of England*, 83–7; *Opusculum de Natura Legis Naturae et de ejus Censura in successione regnum suprema*, in *The works of Sir John Fortescue*, collected by Thomas (Fortescue), Lord Clermont, 2 vols. (London, 1864), i. 59 ff.: p. 80 for *statum regium*, and 187 ff. for a translation; Watts, *Henry VI*, 46–50; RP v. 376.

or the testimony of liars, not as under English law by the verdicts of juries carefully chosen by the sheriffs. Alone of countries, England possesses the institution of the jury to search out the truth, because its fertility leaves yeomen, and for important cases knights and squires, free from the cares of agriculture and able to exercise their judgment and public spirit in the courts. The villages and towns of regally-ruled France are potentially richer even than England's, but the people are burdened by the quartering of royal troops and by the salt-tax; they are rustics wearing the poorest clothes, their women going barefoot except on feast-days; in contrast to Englishmen they are condemned for crimes without due process of law and drowned in rivers by night.<sup>14</sup>

*The Governance of England* draws out the social and political implications of these differences. The French king can rule as he does because the commons of France are too cowed to resist (criminals even rob in a less manly fashion than in England), and the nobles do not seek to restrain the king because they are exempt from tax. What parliament needs to do to mend the political and regal rule of England is not so much grant subsidies as restore the king's permanent endowment by passing acts of resumption of the royal lands and revenues which have been given away—the policy actually pursued by the Yorkists from 1449. The shires should be administered by local men who are the servants of the king not of the magnates, and royal officers and ministers should be rewarded by grants for life only. There should be a reconstituted royal council, its lay members, lacking the support of ecclesiastical benefices, receiving proper salaries as in the French *parlement*. And the councillors should 'continually, at such hours as shall be assigned to them, commune and deliberate upon the matters of difficulty that fall to the king, and then upon the matters of the policy of the realm'—how money may be stopped from going out, bullion brought in, and trade increased; how 'also the laws may be amended in such things as they need reformation in; whereby through the parliaments more good may be done in a month to the mending of the law, than they shall be able to do in a year, if the amending thereof be not debated, and by such counsel ripened to their hands.'<sup>15</sup>

From the French side Philippe de Commines, Fortescue's contemporary, gives a detailed account of the vicissitudes of English politics within a wider comparison of princely government, and expresses an admiration for England as the one among 'all the *seigneuries* of the world' known to him where 'the *chose publique* is best handled, and there is least violence to the people'. The pain of domestic war is

<sup>14</sup> Sir John Fortescue, *De Laudibus Legum Anglie*, ed. and tr. S. B. Chrimes (Cambridge UP, 1942), 24–5, 30–3, 42–113.

<sup>15</sup> *The Governance of England*, 141–57.

confined, he thinks, to the nobles who foment it, and the king of England never raises taxes without assembling his parliament, 'which is equal in worth to the three estates' of France and stands as evidence against the opinion voiced at Tours in 1484 that calling the estates general diminishes royal authority.<sup>16</sup>

The juxtaposition of the universal idea of communities made up of three estates with the fact of the representation in English parliaments of two groups called to meet separately (the one composed of lords summoned by individual writ, the other of knights and burgesses chosen by shires and towns under the supervision of the sheriffs) inspired new interpretations of the English polity in the parliamentary sermons of English chancellors. A series of chancellors from Bishop Beaufort in 1404 to Bishop Russell in 1483 separated the 'lords spiritual' and the 'lords temporal' and made them the two arms of the body of the commonwealth (leaving the commons to be the lower members). Bishop Stafford in 1433 expounded from authorities, histories, and examples a *triplex regni status*, which took account of people unrepresented in parliament and attached to each estate a 'political virtue': to the prelates and lay magnates 'on the mountains' the promotion without dissimulation of peace, unity, and true concord; to the knights, squires, and merchants, 'the middle people . . . on the foothills', the administration of equity and simple justice, without corruption or oppression of the poor; and to the peasants, artisans, and lowly herd, obedience to the king's will and laws, without deceit and murmuring. A more imaginative way of producing three estates in England was to count the king in with the lords and the commons. So, in 1401 the Commons begged King Henry IV to settle the quarrels among the Lords, because 'the estates of the realm could well be likened to a Trinity, that is to say [of] the person of the king, the lords spiritual and temporal, and the commons. And if there was any division among these estates there would be great desolation to the whole realm, which God forbid.' Bishop Stillington in 1468 made it a quartet: he defined justice, on which 'the peace and politic rule of every realm' depended, as 'every person to do his office that he is put in according to his estate or degree, and as for this land it standeth by iii estates and above that one principal; that is to wit, Lords Spiritual, Lords Temporal, and Commons, and over that, State Royal above, as our Sovereign Lord the King'.<sup>17</sup>

The act settling the crown on Richard III in 1483 invoked 'the common opinion of the people, and the public voice and fame' that 'the

<sup>16</sup> Philippe de Commines, *Memoires*, ed. J. Calmette, 3 vols. (Paris, 1924-5), ii. 8, 218-19.

<sup>17</sup> RP iii. 423, 459-60, 522, iv. 70, 419, v. 214, 622-3; S. B. Chrimes, *English Constitutional Ideas in the XV Century* (Cambridge UP, 1936), 81-132.



order of policy . . . of all politic Rule . . . and also the Laws of Nature and of England' had been perverted at the end of Edward IV's reign. In three lengthy drafts of parliamentary sermons in that year Bishop Russell of Lincoln struggled to give the political turmoil constitutional legitimacy. According to the sermon for the intended parliament of Edward V, the 'policy of christian realms . . . over all in the days that we be in' showed 'their public body' to consist of prince, nobles, and people, 'the which to my purpose implieth the present estate of our nobles, our commons, and of our glorious prince'. In the two drafts for Richard III's parliament, the lords spiritual, lords temporal, and commons are described as meeting in parliament to provide how 'this great public body of England' may be 'kept in estate', and the king, his court, and his council become the belly which digests 'all manner of meats', from domestic disturbances to external wars and diplomacy. The 'thing public of a realm or city' is also likened to a child under the wardship of 'such as have the governance of the community [*comine*]'. At Henry VII's first parliament in 1485 the chancellor began by expounding the benefits of a mutual loyalty between king and subjects and an ending of the discord between the stomach and the other members of the body politic, which Livy had 'treated at length', then greeted the first Tudor as another Joshua, sent to lead this famous realm with its ordered and 'splendid laws and institutions' into Ovid's Golden Age. The sermon of 1487 set out what was needed for 'the care of the Commonwealth' [*curam Reipublicae*]; that of 1489 discoursed on the types of justice, of which peace was deemed the end, the discipline of laws and statutes and the proper distribution of offices were declared the means, and the best source of justice for a flourishing *respublica* was proclaimed to be a prince ruling alone as God ruled the universe. In 1491 and 1497 the same chancellor as in 1489, John Morton, archbishop of Canterbury and eventually cardinal, brought examples from Roman history into play, and in 1504 another archiepiscopal chancellor invoked the authority of Aristotle, Cicero, and Augustine, and the experience of the best commonwealths, indeed of human society itself, to show the overriding need of justice for the common welfare in a well-founded *respublica*.<sup>18</sup>

The influence of humanism is evident in the sermons of Henry VII's chancellors, and in the sixteenth century the humanist tradition of description and criticism of the commonwealth was continued by a succession of writers who were first and foremost lawyers: Edmund Dudley, Thomas More, Christopher St Germain, Thomas Elyot, and Thomas Smith. Dudley wrote an allegorical *Tree of Commonwealth* as

<sup>18</sup> RP vi. 237, 240, 267, 385, 409, 424, 440, 458, 509, 520; Chrimes, *English Constitutional Ideas*, 167–91.

he lay in the Tower of London at the beginning of Henry VIII's reign, condemned for his ruthless enforcement of the king's feudal rights as a leading member of Henry VII's 'council learned in the law'. Sir Edward Coke would cite him as one who had subverted the 'ancient and fundamental law' of the land contained in Magna Carta, but Dudley eulogizes the young king as one who 'shall revive the common wealth within this realm' and restore 'the prosperous estate of my natural country', firstly by tending the 'root of Justice without which the tree of comon welth cannot continue'. Another root is 'the concord of the estates of our sovereign lord, the chivalry and the commonalty'; the nobility must learn to be good neighbours and landlords, the commonalty to avoid eating the rotten fruit of 'lewd enterprise', which makes them grasping and arrogant and prone to pamper their wives.<sup>19</sup>

Thomas More's *Utopia*, published in Latin at Louvain in 1516 and translated into English by Ralph Robinson in 1551, uses the humanist project of a search for the 'best state of a commonwealth' (*optimus reipublicae status*) to satirize contemporary society and give the notion new depth. This great but elusive work can be so subversive because it purports to describe, in the form of a humanist dialogue, the ways of a far-away kingdom reported by Ralph Hythloday, a traveller to the New World. The *mores* and *instituta* of Utopia, which Robinson translates as 'the manners, customs, laws, and ordinances . . . of that weal-public'—the common ownership of property, rational planning, education in civility, and equal worth of citizens—are in fact a reproach to the corrupt and intellectually decadent ruling elites of Europe, where 'what are called *Respublicae* today are just a kind of conspiracy of the rich'. At the beginning of the work Hythloday speaks of a visit he once made to the household of Cardinal Morton, Henry VII's chancellor and confidant (in which the young More had in fact been brought up) and his fruitless attempt to persuade 'a certain layman expert in the laws of the country' that the poor in England should be helped rather than condemned for their petty thieving.<sup>20</sup> (It is here in book 1 that occur the famous passages on social justice, the evils of private property, and the way enclosures mean that 'sheep eat up men', which would provide an

<sup>19</sup> *The Tree of Commonwealth: A Treatise written by Edmund Dudley*, ed. D. M. Brodie (Cambridge UP, 1948), 22, 31, 34, 44–5, 48, 51.

<sup>20</sup> *Utopia*, in *The Complete Works of St. Thomas More*, iv, ed. E. Surtz SJ and J. H. Hexter (Yale UP, 1965), 47, 52, 54, 58, 60, 108, 236–41; cf. *More's Utopia*, tr. Ralph Robinson (London: Everyman's Library, 1951), 13, 17, 18, 21–3, 53, 130–3; for commentary on *Utopia* see: Surtz and Hexter (above); A. Fox, *Thomas More, History and Providence* (Oxford: Blackwell, 1982), ch. 2; Q. Skinner, 'Sir Thomas More's *Utopia* and the Language of Renaissance Humanism' in *The Languages of Political Theory in Early-Modern Europe*, ed. A. Pagden (Cambridge UP, 1987); B. Bradshaw, 'Transalpine Humanism', in *The Cambridge History of Political Thought 1450–1700*, ed. J. H. Burns and M. Goldie (Cambridge UP, 1991), 110–13, 116–31.

inspiration for the group of preachers and writers in the middle years of the sixteenth century known as 'the commonwealth men'.<sup>21</sup>

The message of *Utopia* seems to be that the best state of the commonwealth is one not divided by pride and ambition and the pursuit of empty honours but in which justice to the whole people is the first consideration. In contrast to his contemporaries Machiavelli and Seysell, More views the polity from the angle of the common welfare rather than of the government of princes. That rulers should take counsel before legislating was a commonplace of political thought. The statement that, among the Utopians, 'to take counsel on matters of common interest outside the senate or the popular assembly' was deemed a conspiracy between the governor and his officials 'to change the state of the commonwealth' (*statum reipublicae mutari*), and thus a capital offence, seems to reflect the stronger hold of a parliamentary tradition in the English commonwealth.<sup>22</sup>

Thomas Elyot's commonwealth is dully conventional compared with More's. Elyot was a leading humanist with minimal training in the law (though as a junior clerk of the king's council between 1526 and 1530 he would have recorded the examination of defendants and witnesses in the Court of Star Chamber), and in *The book named The Governor*, published in 1531, he parades classical precepts and historical examples for the moral, rather than political, education of ruling elites. That he nevertheless starts from a discussion of 'the signification of a public weal' and 'why it is called in Latin *Respublica*' shows the power of the idea of the commonwealth in England. Philosophers had defined it 'in sundry wise'. Elyot's own view is that: 'A public weal is a body living, compact or made of sundry estates and degrees of men, which is disposed by the order of equity and governed by the rule and moderation of reason', and as an ordered hierarchy of wealth and condition is *not* to be called a *common* weal, where 'everything should be to all men in common'. The book ends with considerations on 'good counsel': 'consultation is but of a small effect wherein the universal estate of the public weal do not occupy the more part of the time, and in that generality every particular estate be not diligently ordered'.<sup>23</sup>

<sup>21</sup> For the 'commonwealth men', see Skinner, *The Foundations of Modern Political Thought* (Cambridge UP, 1978), i. 226–30.

<sup>22</sup> More, *Complete Works*, iv. 124–5, 202–9, 217–21.

<sup>23</sup> Sir Thomas Elyot, *The Book named The Governor*, ed. S. E. Lehmberg (London: Everyman's Library, 1962), 1, 240–1; A. Fox and J. Guy, *Reassessing the Henrician Age: Humanism, Politics and Reform, 1500–1550* (Oxford: Blackwell, 1986), 25, 43–5, 52–62, 138–40; Skinner, *Foundations of Modern Political Thought*, i. 214–16, 234–5, 237–8, 249.

## STATE AND SOVEREIGNTY

Though they contrasted in their social vision, More and Elyot both rested their 'state of the common [or public] weal' on a traditional order which the politics of the Reformation would render obsolete. Both men put their hopes of reform (in a general sense) in the benevolence of the monarchy of Henry VIII, described by Lord Chancellor More at the opening of the parliament of 1529–36 as the good shepherd who had expelled from his flock the scabby 'great wether' (the fallen chancellor, Cardinal Wolsey) and summoned 'his high court of parliament' to reform laws made 'very insufficient' by 'long continuance of time and mutation of things'. But what 'the Reformation parliament' was in fact used by Henry VIII to achieve was his divorce from Catherine of Aragon, and in the process the destruction of papal jurisdiction over the English clergy and the annexation to his crown of the dignity of 'only supreme head in earth of the Church of England called *Anglicana Ecclesia*'. The dominance of parliamentary statute as the supreme source of law for the commonwealth was brutally confirmed by such acts as that of 1533 which forbade appeals to Rome in spiritual no less than temporal matters, a measure justified by the assertion that the realm of England was an empire 'governed by one supreme head and king having the dignity and royal estate of the imperial crown of the same, unto whom a body politic, compact of all sorts and degrees of people divided in terms and by names of spirituality and temporality, be bounden and owe to bear next to God a natural and humble obedience'.<sup>24</sup>

The statutes of the Reformation parliament confirmed a practical dominance of the law made by the king in parliament which had long been emerging, though rulers and their chancellors (Richard of Gloucester in 1483, Cardinal Morton in 1495) might still derive 'politic rule' and the customs and liberties of Englishmen from a grand assembly of 'the Laws of God and of God's Church, and also the laws of Nature and of England', with the Mosaic Law, the Law of Nations and of Equity thrown in.<sup>25</sup> In his influential *Dialogue betwixt a Doctor of Divinity and a Student in the Laws of England: of the Grounds of the Said Laws, and of Conscience*, published (originally in Latin) in 1523, and in a second dialogue of 1531, Christopher St. German translated the law of nature into a fundamental law of reason and conscience, which he found comprehensively embodied in the customs and statutes of England and in the judgments of the English judges who welded them

<sup>24</sup> Edward Hall, *The Triumphant Reign of King Henry the VIII* (London, 1550; repr. 1904), ii. 164–5; Elyot, *The Governor*, 95–102; SR iii. 427–9, 492.

<sup>25</sup> RP vi. 240, 458; Chrimes, *English Constitutional Ideas*, 196 ff.

into the common law. Consequently it also belonged to the common law courts to enforce the laws of God and the Church. St. German went further and declared the claim that there was a separate law of equity or conscience a false one, made by chancellors who had usually been spiritual men with a superficial knowledge of the common law, which 'commandeth all thing that is good for the common wealth to be done, and prohibiteth all thing that is evil and that is against the common weal'. St. German is the probable author of a series of anonymous tracts which exalted the power of common law and the king-in-parliament over the Church, and of proposals drafted in 1531 in the style of an act of parliament, for the reform of the clergy, the creation of a secular system of poor relief, and the putting-away 'of the great multitude of vagabonds and valiant beggars' which were damaging the commonwealth. In his last tract of about 1535, he even asked 'why should not the parliament then which representeth the whole catholic church of England expound scripture rather than the convocation which representeth only the state of the clergy'.<sup>26</sup>

More, who as chancellor was a zealous ally of the bishops in the pursuit of heretics, leapt to the defence of the clerical estate and of 'the very good old and long approved laws, both of this realm and of the whole corps of Christendom'. But his public career and eventually his life were destroyed by his conflicting allegiances to the laws of England and the laws of the universal church. In May 1532 he resigned his office as chancellor, in April 1534 he was imprisoned in the Tower for refusing to take the oath required by the Act of Succession accompanying Henry VIII's marriage to Anne Boleyn, and eventually he was condemned on an indictment which he rejected as 'grounded upon an act of Parliament directly repugnant to the laws of God and Holy Church, the supreme government of which or of any part whereof may no temporal prince presume by any law to take upon him'.<sup>27</sup>

It was during this political contest expressed in terms of the legislative sovereignty of the king-in-parliament that Thomas Starkey's *Dialogue between Pole and Lupset*, probably written in 1529–32, first used 'state' in England at a level of abstraction which left behind 'of the king', 'of

<sup>26</sup> *St. German's Doctor and Student*, ed. T. F. T. Plucknett and J. L. Barton, Selden Soc. 91 (London, 1975), 27–45; J. A. Guy, *Christopher St German on Chancery and Statute*, Selden Soc. Supplementary Series, 6 (London, 1985), 101–3, 133; Fox and Guy, *Reassessing the Henrician Age*, 174 and 95–120: 'Thomas More and Christopher St. German'; C. Russell, 'Thomas Cromwell's Doctrine of Parliamentary Sovereignty', *TRHS*, 6th ser. 7 (1997), 238; *Cambridge History of Political Thought 1450–1700*, 180–1; see also J. W. Gough, *Fundamental Law in English Constitutional History* (Oxford: Clarendon Press, 1955), 17–19, 23–4; N. Doe, *Fundamental Authority in Late Medieval English Law* (Cambridge UP, 1991), 76–7, 134–6, 177.

<sup>27</sup> G. R. Elton, *The Tudor Constitution: Documents and Commentary* (Cambridge UP, 1960), 6–12, 237–9.

the realm' and even 'of the commonwealth'. The protagonists of the *Dialogue* were real people, humanist divines who had known each other as students at Padua. Lupset died in 1530, but Pole moved from Henry VIII's patronage to open opposition to the king's policies, organized from Italy, where he was made a cardinal and twice in the 1550s might conceivably have been elected pope; after the accession of Mary Tudor and Cranmer's deposition he became archbishop of Canterbury and died on the same day as the queen in 1558. Starkey spent several years in the future cardinal's household, but it is his own ideas for social reform that he makes Lupset put into the mouth of Pole in the *Dialogue*; on his return to England late in 1534 he sought to impress them on Henry's minister, Thomas Cromwell, and the manuscript of the work (which the use of Pole's name made unpublishable) survived among state papers.<sup>28</sup>

Humanist in its form and general ideas, the *Dialogue* can be seen to follow an argument similar to the *Utopia*'s, but it is in English and applied straightforwardly to England. At the beginning Lupset seeks to persuade Pole that 'civil order and politic life' are a virtuous 'conspiracy' and that 'marvellous good laws, statutes and ordinances' are, like agriculture, arts and crafts, and 'moderate pleasure with women for increase of the people', part of the wonderful works of men. Pole has a duty to his nation and country not to shun public life but to offer his wisdom to those who have authority to make human law, which is the law of nature interpreted by the opinion of people in particular commonwealths (so that the Turks are not bound to abstain from flesh on Fridays or observe monogamy). Pole gives in and agrees to debate with Lupset 'the order of our country and commonweal, to the which purpose also meseemeth the time exorteth us, seeing that now our most noble prince hath assembled his parliament and most wise counsel, for the reformation of this his common weal'; the commonwealth is indeed 'the end of all parliaments and common councils', and in them everyone speaks of it (17–18). Pole's first point is that the prosperity of a commonwealth rests on the same principles as 'the weal and prosperous state of every private man' (pp. 22 ff.): there has to be a combination of a healthy body (neither too many nor too few people, and all of them fulfilling their office), a soul which is 'civil order and politic law' to give the body life, and a heart which is 'the king, prince and ruler of the state' (31–3).

The 'weal and prosperous state of the multitude in every commonalty'

<sup>28</sup> Thomas Starkey, *A Dialogue between Pole and Lupset*, ed. T. F. Mayer, Camden 4th ser. 37 (London, 1989); G. R. Elton, *Reform and Renewal: Thomas Cromwell and the Common Weal* (Cambridge UP, 1973), 46–58; T. F. Mayer, *Thomas Starkey and the Commonweal: Humanist Politics and Religion in the Reign of Henry VIII* (Cambridge UP, 1989); Skinner, *Foundations of Modern Political Thought*, ii. 91, 100–5, 356.

(it might be 'the state of Christendom' or of 'Christ's church', as well as of 'any country, city or town': pp. 34, 38, 40) is what 'policy and wisdom' seek to establish. The ways in which England falls short of that 'perfect state' include: the enclosure of tillage for sheep-runs, depopulation, and the decay of crafts; the idleness of workers, and the excess of beggars, household servants, ignorant and unprofitable clergy and 'abbey-lubbers'; the ill-education, uncivil customs, and self-indulgence of the lords who should lead; and the poor and dirty buildings which compare so badly with those of France (48 ff., 63–6, 82–7). The remedies, Starkey makes Pole say, lie in statutes, which should for instance: encourage men to procreate 'after a civil order and politic fashion' by taxing bachelors, rewarding those who produce five children or more, and relaxing the law of chastity imposed on the clergy (this 'a great let to the increase of Christian people'); ban the importation of merchandise, which damages English industry, and the export of the wool needed to make cloth; appoint officers to censor 'vain trades', control the entry to crafts, and keep the towns clean; re-enforce the statute of apparel and ordinances against drunken craftsmen; ensure that only those 'of elect wits' become priests or lawyers; follow the Flemish way of helping the impotent poor—but not sturdy beggars, 'if we will make a perfect state'; subsidize fine buildings; and lure gentlemen from their country rudeness to the 'civil life and humanity' of the towns (95 ff., 114 ff.).<sup>29</sup>

The monasteries should be turned over to schools to educate the nobility in government, a proposal Lupset greets as a 'noble institution', which will advance Christian charity more than 'our monks have done in great process of time, in their solitary life which hath brought forth . . . little profit to the public state' (124–6). The clergy must be educated in virtue as well as learning, and the universities reformed because the confused order of studies in them means that 'we have few great learned men in our country'. In particular English law needs detailed reform, if the ideal solution of its replacement by the 'public discipline' of civil (i.e. Roman) law is rejected: succession to land by primogeniture and entail is unfair to younger children, and the overlord's right to the wardship and marriage of minor heirs is no inducement to their proper bringing-up; hungry lawyers spin out law-suits endlessly, and the appealing of cases from the shire sessions to the London courts must be curtailed; procedure in treason trials is unjust; and it would be better to sentence thieves to hard labour for the community than to execute them (126–31).

<sup>29</sup> Cf. G. R. Elton, 'Reform by Statute: Thomas Starkey's *Dialogue* and Thomas Cromwell's Policy', *Proceedings of the British Academy*, 54 (1968), 165–88: repr. in Elton's *Studies in Tudor and Stuart Politics and Government*, ii (Cambridge UP, 1974).

These are reforms of 'the state of the commonwealth'. But 'state' also appears in the *Dialogue* in the other sense of the state of the regime which makes law for the commonwealth. Though none of its elements was entirely new to humanist thought, the programme of reformation put together by Starkey was a radical one that would always have required a strong form of government to carry through. With his Italian education Starkey was well equipped to apply humanist theory about the different states of regime to the English situation. Pole is made to explain that what he calls 'now policy, now civil order and now politic rule' has grown by the devising by politic men of laws which accorded with the natures of particular peoples, so that some were 'governed and ruled by a king or prince, some by a common council of certain wise men and some by the whole body and multitude'—it did not matter which, provided 'they which hath authority and rule of the state look not to their own singular profit nor to the private weal of any part, but . . . to the common weal of the whole', and everyone did his duty according to his 'state, office or degree'. Since the perfect state is not the weal of any particular part but of all together, this 'common weal determineth to it no particular state, which by politic men have been reduced to iii, neither the rule of a prince, neither of a certain number of wise men, neither yet of the whole multitude and body of the people, but in every one of these, it may be found perfect and stable . . . so long as every part is kept in his order with prosperity' (35 ff.).

England was clearly a country that had long been ruled 'under the state of princes, which by their regal power and princely authority have judged all things pertaining to the state of our realm, to hang only upon their will and fantasy', and Pole does find it a fault in the 'order and rule of the state of our country' that such a prince is not elected. It is a 'most perfect and excellent state of a policy' to be ruled by a wise prince like the present king, ever 'content to submit himself to the order of counsel', but history shows that hereditary succession does not guarantee one: if inheritance must continue to prevail over election in England, 'high authority' should be kept from the prince and committed 'only to the common counsel of the realm and parliament'. The king is under the law, and it is wrong that the prince's proclamations—or the pope's dispensations—should nullify 'laws and statutes in parliament ordained'. Lupset marvels that Pole will thus 'allow the state of a prince' but not give him a prince's authority 'to moderate all things by his pleasure and will'. Pole replies that such a tyrannical order might have been convenient at the first entry of William the Conqueror, but was nothing like 'the perfect state and true common weal' which he hoped might be established, whereupon Lupset complains that Pole is



always stopping his mouth 'with this consideration of the perfect state', which itself 'smelleth a little of tyranny' (67 ff., 82).

In the third part of the *Dialogue*, after they have gone to mass and invoked the Holy Spirit, Pole and Lupset consider 'how to restore to our politic body its perfect state and commonwealth', treating 'by way of governance' the faults they have enumerated. Pole harks back to his belief that actual princes are rarely adequate to the princely state, and that to guard against 'frenzy' in the head of the body politic the people should have the power to choose and depose their rulers. But what was essential in 'such a kind of state' as existed in England was that laws made with the consent of parliament 'must rule and govern the state and not the prince after his own liberty and will'. The king should do nothing 'pertaining to the state of his realm' without the authority of his council, over which should be set another council comprising two bishops ('as of London and Canterbury'), 'four of the chief judges and four of the most wise citizens of London', who are to exercise the authority of 'the great parliament' when that is not in session, and call it when 'the reformation of the whole state of the commonalty' is necessary. This supreme council would also choose the king's 'proper council', with the king appoint to 'all bishoprics and all high offices of dignity' so as to avoid the worst effects of royal favouritism, and make peace and war with foreign countries. Thus a princely state would become the 'mixed state' which men affirmed to be the best, a 'temperate and sober' body politic like Venice, which had 'continued above a thousand years in one order and state'.

The emphasis in these uses of state is on the nature of the regime, but it shifts back on to the whole commonwealth in the context of the proposals which conclude the *Dialogue* for the translation of the gospels and the laws of the land into the tongue of the people; for the devotion of ecclesiastical wealth to charitable purposes; for the better education of nobility and clergy; and lastly for the appointment of 'conservators of the common weal' to 'see to the policy' by ensuring that every under-officer does his duty and thus 'conserve the whole state marvellously'. Though Lupset fears that the power of law can never bring men to reason and virtue, Pole believes that it can point them on the way. And the Tudor monarchy seems to have acted on the same belief, to judge from the statutes, exemplified by Elizabeth I's great poor laws, through which it assumed the social and charitable responsibilities of the Church and delegated them to overseers of the poor and to the justices or 'conservators' of the peace who would govern the English shires well into the nineteenth century.

As soon as it lost the qualifying 'of the king' as well as 'of the realm' or 'the commonwealth', as it did in Starkey's *Dialogue*, the word 'state'

acquired the ambiguity which Raleigh noted and which has given it its special resonance ever since. It was an ambiguity appropriate to a commonwealth in which the sixteenth-century reformation of religion and society was bringing to a climax medieval reform of the *status regni*, doing so by statutes which the 'estate royal' made in conjunction with the estates of lords and commons. The statute of 1532 which cut off the payment of annates from England to the see of Rome has 'the whole body of this realm now represented by all the estates of the same assembled in this present Parliament' declaring it the king's duty as 'a good Christian prince' to stop such abuses, 'for the conservation and preservation of the good estate and commonwealth of this his realm'.<sup>30</sup> In 1536 Lord Chancellor Audley justified the demand for a second Succession Act after the failure of Henry's marriage to Anne Boleyn by the dependence of 'the state and safety [*statum et incolumitatem*] of this his realm of England' on the royal person; and five years later he proclaimed the *Respublica* to be the work of the king, who had summoned the three estates, as 'the whole body of the commonwealth of England', to provide the medicine of new laws for unheard of diseases.<sup>31</sup> The statute of 1539 'that proclamations made by the King shall be obeyed' gave parliamentary authority to the exercise of the king's prerogative, and in 1543 Henry claimed to have been 'informed by our judges that we at no time stand so highly in our estate royal as in the time of Parliament, wherein we as head and you as members are conjoined and knit together into one body politic'.<sup>32</sup> At the beginning of Edward VI's reign *A Homily on Obedience* emphasized the authority of princes and magistrates 'and such states of God's order', but especially that of anointed kings, appointed by God to make laws, judgments, and officers.<sup>33</sup>

Henry VIII's claim for the monarchy of the headship of both body politic and the church in England, combined with a growing awareness that the commonwealth was 'compact of all sorts and degrees of people' (in the words of the Act in restraint of appeals) and that the monarch ruled through a fast developing court and administration set far above what Sir Thomas Elyot called a multiple 'discrepance of degrees',<sup>34</sup> made the nature of the regime increasingly contested. An act of Queen Mary in 1553 repealing her father's treason statutes might declare that 'the state of every king, ruler and governor of every realm, dominion or commonalty' consisted in the 'love and favour of the subjects toward

<sup>30</sup> SR iii. 385–8.

<sup>31</sup> *Journal of the House of Lords*, i. 54, 164–5.

<sup>32</sup> Elton, *Tudor Constitution*, 15, 27, 270, 342.

<sup>33</sup> *Ibid.* 15–16.

<sup>34</sup> SR iii. 427; Elyot, *The Book Named the Governor*, 1–5; for the growth of the Royal court-based administration, see *The English Court: from the Wars of the Roses to the Civil War*, ed. David Starkey (London, 1987).

their sovereign ruler and governor', not in 'the dread and fear of laws',<sup>35</sup> but in a time of religious turmoil such love was difficult to hold, especially for women rulers. Theories justifying on religious grounds political resistance to regimes perceived as malignant originated with the protestant leaders who went into exile in Strasbourg and Geneva when Mary Tudor came to the throne, restored papal authority, and ruled with her husband Philip of Spain. In his *Shorte Treatise of Politike Power* (1556), John Ponet, the exiled bishop of Winchester, cites the example of Queen Athalia, the 'woman tyrant' rightfully killed by the 'nobility and commons' of Israel when they learnt 'by experience what misery it was to live under the government of a mischievous woman', and chides the 'Lords and commons of England' for not heeding 'the preachers of God's word in the time of the godly Josias king Edward the Sixth', who prophesied the miseries to come—the 'subversion of the policy and state of the realm', under the rule of a strange king and strange people.<sup>36</sup>

According to Ponet, 'states, bodies politic, and common wealths' were ordained by God to make for themselves positive laws (e.g. on the use of moderate diet and apparel), which kings might not override. Even kings to whom 'the whole state and body of their country' had surrendered power to make law, and by an 'evil custom' to dispense from the law, might use it only 'in matters indifferent', 'of themselves . . . neither good nor evil'—and such kings were still tyrants. A king cannot break the laws 'godly and profitably ordained for the common wealth'; if he could, 'then were it in vain to make solemn assemblies of the whole state, long Parliaments etc . . . yea (I beseech thee) what certainty should there be in anything?'. Men should respect their country and the commonwealth rather than their princes who were only members of it; 'commonwealths and realms may live, when the head is cut off, and may put on a new head'. This 'whole state' of the commonwealth preserved so well in Venice, is unambiguously good, but there is sometimes in Ponet's usage also a sense of state as regime, which is to be feared, along with its 'courts and parliaments', when it does not live up to his ideal of the 'mixed state' and act for the sake of 'the multitude'. 'Kings, governors and states' are seen as no longer intervening in other cities and realms to relieve the oppressed, but simply to annex territory.<sup>37</sup>

When Elizabeth became queen in 1558, John Aylmer, a future bishop of London, answered (also from Strasbourg) John Knox's invective

<sup>35</sup> SR iv. 198.

<sup>36</sup> Ponet's *Treatise* is printed at the end of W. S. Hudson, *John Ponet (1516?–1556): Advocate of Limited Monarchy* (Chicago UP, 1942), with a separate pagination: see pp. 11, 62, 69, 98, 114–15, 161, 173; for the biblical Queen Athalia, see 2 *Chronicles*: 22 and 23.

<sup>37</sup> Ponet, *Treatise*, 9, 18, 22, 25–8, 61, 108, 110, 140–1.

against the 'Monstrous Regiment [i.e. government] of Women' with a domestic version of the 'mixed state' argument: it did not matter if the ruler was a woman, provided she ruled by counsel, since the monarch was only one of three estates, and the image of the regiment of England, 'and not the image but the thing indeed, is to be seen in the Parliament house, wherein you shall find . . . the king or queen, which representeth the monarch, the noblemen which be the aristocracy, and the burgesses and knights the democracy'. Nevertheless the state of a woman ruler who claimed jurisdiction even over 'the state ecclesiastical' was bound to be a major political issue.<sup>38</sup> In 1580 Elizabeth had to tell the Commons 'not to deal with Matters touching her Majesty's Person or Estate, or touching Religion', but accompanied the rebuke with assurances of the queen's 'loving Care for the Advancement of religion, and the State' and for her subjects' 'happy and peaceable State', and with an acknowledgement of the zeal the Commons showed for 'the State of the Commonwealth'.<sup>39</sup> In the same session an MP, Arthur Hall, was called to account for defaming 'the whole State of the House' [of Commons], by questioning the supposed Anglo-Saxon origins of parliament, 'to the great Impeachment of the ancient Order and Government of this Realm, the Rights of this House' as the 'third Estate of the Parliament', and 'the Form of making Laws'.<sup>40</sup>

In other uses of 'state,' references to the whole commonwealth and to the regime that makes and enforces the commonwealth's laws become difficult to disentangle. Which—regime or commonwealth—does the commission of 1561 mean that instructs the archbishop of York and other bishops and nobles to exercise the crown's jurisdiction over the church and search out 'all heretical opinions, seditious books, conspiracies, slanderous words, etc. against Queen or State'; or the Lord Keeper's declaration to parliament in 1562 that it had been called 'for Religion, Discipline, and Aid to the State'; or the Queen in 1570 when she warns of 'the danger that may grow to the State' by the delay in apprehending a rebel; or the denunciation of threats to 'both church and state and all' in 1589 and to 'her majesty and the state' in 1590; or privy council's thanking of the bishop of London in 1602 for defending 'Her Majesty's honour and the good of the State' by getting the Jesuits to reveal to him 'dangerous purposes contrived against the State'?<sup>41</sup> And

<sup>38</sup> Elton, *The Tudor Constitution*, 16; OED, s.v. *state*, 27–32; *Calendar of State Papers Domestic* [CSPD] 1601–3 & *Addenda* 1547–65 (London, 1870), 510; A. N. McLaren, 'Delineating the Elizabethan Body Politic: Knox, Aylmer and the Definition of Counsel, 1558–88', *History of Political Thought*, 17 (1996).

<sup>39</sup> *Journal of the House of Commons* [CJ], i. 75, 118–19, 126.

<sup>40</sup> CJ i. 126.

<sup>41</sup> CSPD 1601–3 & *Addenda* 1547–65, 155, 211, 246, 510; CJ i. 62; *Journal of the House of Lords*, ii. 357–8.

what is the state in Shakespeare's plays that has business, cares, nerves, tricks, arguments, papers to be perused and reasons which cannot be disclosed; that has peers as its pillars, but suffers storms and plots, totters before conspiracies and has something rotten in it; that Othello serves, but Prince Lewis (in *King John*) will not, being too high-born to serve as the 'instrument | To any sovereign state throughout the world'; and that is resigned along with his crown by Richard II, accused of crimes 'against the state and profit of this land'?<sup>42</sup>

Most of Shakespeare's uses of state can be interpreted as referring to the 'sovereign state' or authority that rules the commonwealth, but some appear to slip over to meaning the organized commonwealth within which a sovereign rules. The most important example of the ambiguity in an official context is that of the 'secretary of state', as the monarch's principal secretary was beginning to be called towards 1600, at the end of a century in which he emerged as the key figure in the privy council and thus of the entire apparatus of royal administration. Soon after the death of Sir Francis Walsingham, principal secretary from 1573 to 1590, two of his subordinates wrote accounts of the enormous variety of duties of the office, than which none was more necessary amongst the 'places of charge in this state'; in particular, the secretary must 'make himself acquainted with some honest gentlemen in all the shires, cities and principal towns and the affection of the gentry' and 'to understand the state of the whole realm', with 'Sir Thomas Smith's book' as his guide.<sup>43</sup>

Smith had been a principal secretary in 1548–9 and 1572–6, and while an ambassador in France in the 1560s, he had written a treatise *De Republica Anglorum* ('On the English Commonwealth'), which was posthumously published in 1583. Strikingly this work by a civil lawyer with a doctorate from Padua proceeds from the conventional starting-point of the Aristotelian constitutions, which he calls different 'estates', 'commonwealths', or 'governments of commonwealths', and a discussion as to how any commonwealth may 'be kept in her most perfect estate', to a cool and practical analysis of the English legal system. In a letter from Toulouse to a colleague, Smith said that, although he lacked books and lawyers to consult, he had endeavoured out of a 'yearning for our commonwealth', to 'set forth the whole of its form, especially those points in which it differs from the others'; and since in fact it was different in almost everything, he had written (despite the title of the treatise) 'in the language of our own country', in a style midway

<sup>42</sup> M. Spevack, *A Complete and Systematic Concordance to the Works of Shakespeare*, vi (Hildesheim, 1970), 3024–6; for 'sovereign state', see Shakespeare's *The Life and Death of King John*, V. ii. 82.

<sup>43</sup> OED, s.v. *secretary*, 3; Elton, *The Tudor Constitution*, 123–7.

between the historical (as one 'not ill versed in our country's institutions') and the philosophical (discussing whether the law in England was more just or unjust than Roman Law 'here' in France).<sup>44</sup>

There are five ways in which commonwealths or their governments are held to differ. The first is in the way laws and ordinances are made by the 'ruling and sovereign part' (bk. 1, c. 2; bk. 2, c. 4). In England, what is done in parliament, 'by the whole universal and general consent and authority' of prince, nobility, and commons, is called 'firm, stable, and *sanctum*, and is taken for law', and Smith therefore takes pains to describe how bills are debated (members of parliament using 'no reviling or nipping words'), discussed in committee, voted on (those in favour 'going down with the bill', those against sitting still), and finally approved. 'The Parliament abrogateth old laws, maketh new . . . changeth rights, and possessions of private men, legitimateth bastards, establisheth forms of religion, altereth weights and measures, giveth forms of succession to the crown . . . appointeth . . . taxes, giveth most free pardons and absolutions, restoreth in blood and name as the highest court, condemneth or absolveth whom the Prince will put to that trial . . . (bk. 2, c. 1).' Despite the extraordinary power he gives parliament in conjunction with the prince, which also embraces the third of the five differences of the English commonwealth—how funds are provided for its upkeep and defence—Smith insists that English monarchs are as 'absolute' as any ruler, a fact shown by differences 2 and 4: their power alone to make war and peace, and to choose ministers and magistrates (bk. 2, cc. 3, 4). But he thinks all actual commonwealths are mixed (bk. 1, c. 6). Smith identifies government with commonwealth because it is distributed among all estates from the yeomanry upwards, and this is shown above all in the fifth difference, the administration of justice described in the final two thirds of the treatise (bk. 2, c. 5 to bk. 3, c. 9) in courts which range from parliament, Star Chamber (existing long before it 'took great augmentation' from Cardinal Wolsey), and the benches in Westminster Hall, to the sessions of the justices of the peace and the leets of the great lords, all operating on the monarch's authority but dependent on the work of sheriffs, jury-men, and constables.

#### JEAN BODIN ON THE STATE

In 1576, between the writing and the printing of Smith's *De Republica Anglorum*, a French professor of law and *procureur du roi* who had

<sup>44</sup> M. Dewar, *Sir Thomas Smith: A Tudor Intellectual in Office* (London UP, 1964), 111–12; *De Republica Anglorum*, ed. M. Dewar (Cambridge UP, 1982).

himself studied and taught in Toulouse before moving to Paris in 1559, published in his *Six Livres de la République* an analysis of the relationship of sovereign to subjects within an ideal commonwealth which earned him the reputation of founding the science of the state.<sup>45</sup>

Jean Bodin was a member of a school of French lawyer-humanists whose ambition was to make from Roman law a public law that was valid for their own age, while preserving the distinctive customs of what they believed to be France's ancient 'feudal' constitution. He stands at the beginning of 'the modern state' because the venture led him to compare the evolution of the laws and constitutions of all the historical commonwealths he could find, thus turning the abstract *status reipublicae* into the living *état* which could be recognized and anatomized. Ten years before his *République* he produced (in Latin) a work of great originality on the study of history, by which, he maintained, the explanation of the state and transformations of commonwealths (*in Rerum publicarum statu et conversionibus*) must be sought. No one from Aristotle onwards, he maintained, had yet been able to define 'the best state of the *civitas*'; Machiavelli had advanced the subject with his maxims, but he would have written more truly if he had joined his experience to the science of philosophers and historians. Bodin's strategy in his *Method for the better understanding of history* is to search for the *optimus reipublicae status* among actual commonwealths, analysing the states and vicissitudes of Jewish rule (*status et conversiones imperii Hebraeorum*) in the pages of the first-century Josephus; the 'state of the Romans' in the writings of Livy, Cicero, and Polybius; the alterations of power in Britain from the *English History* of Polydore Vergil, who had died when Bodin was in his teens; and the types of government amongst the Swiss and in Venice, Florence, Genoa, Lucca, and Nuremberg (as well as Germany as a whole) with the help of a great range of historians. States of commonwealths, Bodin insists, is what history is about, not the traditional succession of four empires and ages of gold.<sup>46</sup>

In the *Methodus* Bodin is intent on analysing the supreme power in a polity, 'which the Italians call signory, we sovereignty, the Latins *summam rerum* and *summum imperium*', for a commonwealth is not made by the confederation and commercial relations of cities, or even

<sup>45</sup> I have used *Les Six Livres de la République de J. Bodin Angevin* in the edition printed in Paris in 1580.

<sup>46</sup> *Methodus ad Facilem Historiarum Cognitionem*, in *Oeuvres philosophiques de Jean Bodin*, ed. and tr. P. Mesnard (Paris: Presses Universitaires de France, 1951), 107–9, 114, and the key ch. 6, *De statu rerumpublicarum*, 167–223; the introductory chapter of J. G. A. Pocock, *The Ancient Constitution and the Feudal Law*, 2nd edn. (Cambridge UP, 1987), gives an account of the influence of the French jurists' historical studies on the development of constitutional ideas.

shared religion and laws, but by the existence within the country of an authority able to make the laws and appoint magistrates to apply them. A state is defined by the existence within it of a power with the five marks of sovereignty, which turn out to be Smith's five variables of governments except that the power of life and death replaces the negotiation of taxes between king and parliament. Bodin of course draws on his knowledge of the *respublica* which had been created in medieval France, as Smith does on his experience of the historical English commonwealth. Already in the *Methodus*, he asserts that a constitution cannot be mixed, because sovereignty cannot be shared. Rule by a monarch, by the nobility, or by the people are the only possible states of regime, and of the three monarchy is the most natural and therefore best.<sup>47</sup>

Bodin himself effectively reduces the number of states of regime to one, that is rule of a community by a true sovereign. In 1587, the English lawyer Richard Crompton expressed what was perhaps already a commonplace when he wrote, in his *Short Declaration of the Ende of Traytors and False Conspirators against the State, and the Duetie of Subjects to their Sovereigne Governour*, that 'there is no Common wealth, state, or societie of man kind, that can continue, where there is not superiority or preheminance in government'. The originality Bodin claimed was in the demonstrating that indivisible sovereignty was always exercised through the medium of a diverse political culture, which included in the case of France the scrutiny of new laws by *parlements* and estates, the approval of royal alienations by the *Chambre des Comptes* (Machiavelli was wrong in saying that the French king had absolute control of the public treasure), and the authority of lords over their vassals. There was no better argument for the strength of the French commonwealth, Bodin wrote in the *Methodus*, than the way that the courts and the great towns had continued in full splendour through the war of religion which had just set the whole country aflame, and that the edicts of the best of kings were quickly extinguishing the tumult.<sup>48</sup>

By 1576 the religious fanaticism which found hideous expression in the massacre of Saint Bartholomew's Day had destroyed such confidence. *The Six Books of the Commonwealth* supplemented the *Methodus* with examples from recent politics, sharpened its arguments, and put them in the vernacular so (Bodin said) that they might be understood by all Frenchmen who wished to see 'the state of this Realm' rescued from the contemporary barbarism and restored to its former glory. In such a crisis salvation was not to be looked for from the estates

<sup>47</sup> *Methodus*, 169, 173, 174-7, 214-16.

<sup>48</sup> OED, s.v. *state*, 27, 30; *Methodus*, 206-10: 'Status & Conversiones Imperii Gallorum'.



general (in which Bodin himself sat in 1576), for it reflected and confirmed the divisions within the country, but in a 'sovereign majesty' whose indivisibility Bodin asserted even more strongly and whose essence he now defined as 'giving the law to subjects in general without their consent'. The opinion that some had dared to put into print that the French *état* was a mixture of the three [types of] commonwealth ('des trois Républiques'), the *parlement* of Paris embodying a form of Aristocracy, the three estates constituting the Democracy, and the King representing the royal state ('l'estat Royal'), was declared to be not just absurd but a treason punishable by death.<sup>49</sup>

The *Methodus* surveyed actual states in history: the *Six Livres* combined historical examples with Aristotelian logic to construct a model state, which (it was concluded) needed a sovereign legislator in order to survive in a dangerous world. The *location* of this sovereignty under one of only three possible headings—monarchy, aristocracy, or democracy—was necessary simply to prevent the political scientist getting lost in a world of republics more or less virtuous, tyrannous, or oligarchical. But to avoid Aristotle's confusions and fully understand a particular polity another distinction was required, which Bodin claimed no one before him had recognized, between the formal 'state of a Republic', which was 'always simple', and the mode of government of that republic. Monarchy was the contrary of 'l'estat populaire', yet the sovereign majesty might be in a monarch who nevertheless could be said to govern 'son estat populairement', if he chose to distribute 'estates, magistracies, offices and honours indifferently to all, without regard to the claims of birth, wealth or virtue': the state would still be a monarchy. Likewise a commonwealth such as ancient Rome, in which the people held sovereignty but gave offices to the nobly born, was an example of 'l'estat populaire gouverné aristocratiquement'. It was a distinction that shifted the concept of the state from the sovereign authority towards the political life of the whole commonwealth.<sup>50</sup>

This wider 'estat de la République' could be delegated by a sovereign people to a dictator to 'manage' and 'reform', and could flourish, decay, and be ruined by malice or simple ignorance of 'affairs of state'. For Bodin the ideal state in this sense was of course the French monarchy working properly. The French, not Machiavelli's Italians, enjoyed the climate in which men could best 'negotiate, traffic, judge, lead,

<sup>49</sup> *Les Six Livres de la République*, preface; book 1, caps. 8 and 10; book 2, cap. 1; cf. the English tr. of the work published in 1506 by Richard Knolles as *The Six Books of a Commonwealth. Written by I. Bodin a famous Lawyer, and a man of great Experience in matters of State*, and repr. under the editorship of Kenneth D. McRae (Cambridge, Mass., 1962); for a recent translation of bk. 1, caps. 8 and 10, and bk. 2, caps. 1 and 5, see *Bodin on Sovereignty*, ed. J. H. Franklin (Cambridge UP, 1992).

<sup>50</sup> *Les Six Livres de la République*, bk. 2, caps. 1 and 7, pp. 251, 339–41.

command, . . . make laws for other nations', and go on to establish the 'best kind of Commonwealth'. The latter is defined as a balanced arrangement of the 'members' of the republic, 'that is to say, the sovereign Prince [who must exist] in every type of Commonwealth; then the Senate, Officers and Magistrates; the corporations and Colleges, estates and communities; and the power and duty of each of them'. Bodin is describing a France in which the king's four secretaries of finance had become known by the second half of the sixteenth century as 'secretaries of state', each with oversight of a section of the country and its frontiers: a France depicted in 1579 by Charles de Fignon, an assistant of one of these secretaries, as a great 'Tree of Estates and Offices', with the 'Conseil Privé et d'Estat du Roy' as its roots, its trunk the royal chancery, and its branches the secretaries, administrative departments, and courts of justice.<sup>51</sup>

A desperate wish for an unassailable monarchy to bring the country through the wars of religion appears in the dogged argument (in book 2, chapter 5) that it is never permissible to go against a prince who is sovereign by right of election or inheritance, however cruel and tyrannical his behaviour. But Machiavelli's recommendation that the prince should use any stratagem, however unjust and irreligious, to achieve and retain power is utterly rejected. Bodin's sovereignty is exercised within a metaphysical framework which looks back to Aquinas rather than forward to a Hobbesian calculation of the natural passions of 'Pride, Revenge, and the like' against which the laws of nature are helpless 'without the terror of some Power'. According to Bodin, the king cannot be compelled to obey the laws of which he is the maker, but if he swears to observe the laws of his predecessors he is bound by the sacred laws of nature to observance of this contract, which is thus a 'rule of state'. The 'state of the realm' and 'the sovereign majesty' are themselves 'stayed and grounded' on 'laws royal' (such as the Salic law) which cannot be annulled. The function of the prince and the prince alone is to make a commonwealth out of a diversity of races, languages, religions, and customs, by allocating status to his subjects and distinguishing citizens before the law.<sup>52</sup>

In the *Six Books of the Commonwealth*, political empiricism is thus joined to a vision of metaphysical order inherited from the middle ages and registered in codes of law. Bodin was always a jurist, and besides an array of histories the argument of his book on the 'science Politique' of the commonwealth, 'the princess of all the sciences', draws

<sup>51</sup> *Les Six Livres de la République*, preface, pp. iiiia, v, bk. 1, cap. 8, pp. 122–4; H. Lloyd, *The State, France and the Sixteenth Century* (London, 1983); E. le Roy Ladurie, *The Royal French State 1460–1610*, tr. J. Vale (Oxford: Blackwell, 1994), 141–2, 200–13, 274–5.

<sup>52</sup> *Les Six Livres de la République*, preface, pp. iiib–ivb, bk. 1, cap. 8, pp. 128, 132, 137, 152, bk. 2, cap. 5, p. 307; Thomas Hobbes, *Leviathan*, part II, cap. 25.

on the local customs of France, laws registered in *parlement*, and six thousand marginal citations of Roman and Canon law. In his writings, the metaphor for a commonwealth is not the human body but arithmetical harmony expressed in a system of justice. As he promises in the preface, the *Republic* ends with a discussion of 'justice distributive, commutative and harmonic, showing which of the three is proper to *l'estat bien ordonné*'. *L'estat de Monarchie* is simple, but royal monarchy is the best sort of state when its government is 'tempered by Aristocratic and Popular Government, that is to say by harmonic justice, which is made up of distributive or Geometric justice, and commutative or Arithmetic, which belong [respectively] to the Aristocratic and the Popular state'. The laws of the king of France, like God's law, follow harmonic proportion, allotting offices, rewards, and penalties to everyone, but in proportion to their status. Philip the Fair's ordinance ('never printed') on excessive dress and diet is given as an example of such a law, for it administered equal (and arithmetical) justice to all by (geometrically) setting 'unequal penalties for unequal persons'.<sup>53</sup>

#### STATE, NATION, AND POLITICS IN FRANCE

Bodin clung to Thomas Aquinas's vision of an ordered commonwealth in which the legislative sovereignty of the monarch reflected the cosmic sovereignty of God, in the face of religious upheavals that transformed the model of the 'state of the commonwealth' from legal system to national association, and the legitimacy of state power from a metaphysical question into an intensely political issue. 'Nation' appears late in political thought, and 'Nation-State' is a twentieth-century expression, though there was of course a sense of national identity in the middle ages, tending to show itself most clearly at the level of the province, where local custom helped to consolidate it: the feeling of Norman lords for their nation was exhibited both in their opposition to English occupation and in their opposition at the estates general of 1484 to the taxes which the crown claimed to impose on the provinces for the utility of the larger nation (*nationis utilitas*). But 'nation' (signifying a group that belonged together by birth) was less a term of political rhetoric than 'people' (*populus*), defined by Philip Pot in 1484 as

<sup>53</sup> *Les Six Livres de la République*, preface, p. iiii, bk. 6, cap. 6, pp. 1013, 1032, 1049, 1051; for Philip IV's ordinance, see above, p. 229; W. H. Greenleaf, 'Bodin and the Idea of Order', in *Jean Bodin*, ed. H. Denzer (Munich, 1973), 29–36; M. Villey, 'La Justice harmonique selon Bodin', *ibid.* 76–8; R. E. Giesey, 'Medieval Jurisprudence in Bodin's Concept of Sovereignty', *ibid.* 167 ff.; D. Parker, 'Law, Society and the State in the Thought of Jean Bodin', *History of Political Thought*, 2 (1981), 255–84.

'all inhabitants of the kingdom of whatever status', who should be regarded as the ultimate source of the ruler's authority. The concept was given new life by the sixteenth-century writers who questioned the sovereignty of *l'estat de Monarchie* in the name of religious truth, and in the process opened the way to a more modern sense of state.<sup>54</sup>

The Huguenots who contested the state of a king they saw conniving at the massacre of his protestant subjects helped to make the 1570s a decade of the most intense constitutional debate since the Hundred Years War. *Francogallia*, published by Francis Hotman in 1573, the year after the St. Bartholomew's Day massacre drove this great Calvinist jurist from Paris to Geneva, was most original in its founding of old theories of limited kingship on a detailed constitutional history of France, which Hotman believed showed the people exercising the power to make and unmake kings right back to Frankish times.<sup>55</sup> The power of the people was exalted further in the anonymous *Vindiciae contra tyrannos* ('justice against tyrants'), in form a scholastic disputation but in substance an uncompromising assertion of the people's right to disobey their king if he did violence to God's law. Indeed, the tract made it an obligation on all citizens to follow the nobles and magistrates in using force against a bad king, for the Old Testament showed that kingship was instituted by a covenant between God and the people as a whole. This reasoning opened the way to a purely secular theory of government, which posited a further contract between the people and the king obliging him to do justice in accordance with the laws and customs they had made, and entitling them to resist if he oppressed the commonwealth. The same line of argument was pursued by George Buchanan, a Scottish Calvinist who was no stranger to France, in his *De jure regni apud Scotos*, also published in 1579.<sup>56</sup>

Talk of the king's contractual responsibilities and the placing of their enforcement in aristocratic hands hints at the influence of medieval ideas of the relationship of the lord paramount to his feudal tenants-in-

<sup>54</sup> *Supplement to the OED*, s.v. *nation*, 9; G. Dupont-Ferrier, 'De quelque synonymes du terme "province" dans le langage administratif de l'ancienne France', *Revue Historique*, 161 (1929), 301–3; id., 'Le Sens des mots "patria" et "patrie" en France au moyen âge et jusqu'au début du XVII<sup>e</sup> siècle', *Revue Historique*, 188–9 (1940); B. Guenée, *States and Rulers in Later Medieval Europe*, tr. J. Vale (Oxford: Blackwell, 1985), 216 ff.; Ladurie, *The Royal French State*, 278 ff.; Masselin, *Journal*, 148, 424.

<sup>55</sup> Francis Hotman, *Francogallia*, Latin text by Ralph E. Giesey, tr. J. H. M. Salmon (Cambridge UP, 1972), 234–5, 286–321, 399–401, 415–51, 458–9.

<sup>56</sup> *Vindiciae contra tyrannos*, in *Constitutionalism and Resistance in the Sixteenth Century*, tr. and ed. J. H. Franklin (New York, 1969); Ladurie, *The French Royal State*, 190–1; on Buchanan, see J. H. Burns, *The True Law of Kingship: Concepts of Monarchy in Early-Modern Scotland* (Oxford: Clarendon Press, 1996), esp. 208; for the long-term political significance of the sectarian controversies of the sixteenth century see also the classic work of J. N. Figgis, *Studies of Political Thought from Gerson to Grotius*, 2nd edn. (Cambridge UP, 1916; repr. by the Thoemmes Press, Bristol, 1998), lectures IV and V.

chief, but what really challenged royal sovereignty was the attribution of overriding authority to the conscience of the citizen in a time of religious conflict. The threat religious fanaticism posed to the stability of a commonwealth could be seen in the final proposition of the *Vindiciae* declaring that neighbouring princes were 'obliged to aid the subjects of another prince who are persecuted for the exercise of true religion or are oppressed by manifest tyranny'; and in the intransigence of the Catholic League when the French monarchy attempted to make peace with the Huguenots, which led in 1588 to the killing of the Catholic leaders, the Duke and the Cardinal of Guise, on royal orders, and the assassination in turn of Henry III, an act inspired and justified by Catholic propagandists.<sup>57</sup>

Bodin provided inspiration to the apologists for monarchy who countered the sectarian 'monarchomachs' with the doctrine of the king's 'divine right' to rule. Other writers, who shared his fears but not his metaphysics, looked to a more pragmatic political morality and justification of the state, as humanists seeking them first in the experience of the classical Roman commonwealth and the writings of Tacitus, whose ironical histories of the despotic and cruel reigns of Tiberius and Nero received a vast number of editions and commentaries in the late sixteenth and the seventeenth century. The Belgian Justus Lipsius, a Jesuit-educated teacher at Leiden famous for his editions of Tacitus and Seneca, wrote his *Six Books of Politics or Civil Doctrine*, which went through fifteen editions within ten years of its publication in 1589 and was translated into all the main European languages, amid the 'civil calamities' of the Low Countries, torn between the rule of Catholic Spain and aspirations of the Protestant Dutch Republic. Lipsius saw 'the state of Europe' being ruined by 'pretext of piety', which placed government at the mercy of a light-headed, seditious, and quarrelsome people, inclined to believe every rumour, use extreme language, and follow 'hot and fiery fellows'.<sup>58</sup>

Lipsius was a leader among those who embraced the Stoic virtues of constancy and obedience out of an abhorrence of both sectarian anarchy and the amoral 'reason of state' which his contemporary Giovanni Botero found in the writings of Tacitus and Machiavelli. He did not preach a metaphysics of absolute sovereignty, but rather what

<sup>57</sup> J. H. M. Salmon, 'Catholic resistance theory', ch. 8 of *The Cambridge History of Political Thought, 1450-1700*.

<sup>58</sup> *Six Bookes of Politickes or Civil Doctrine, written in Latine by Iustus Lipsius: which doe especially concerne Principallitie, Done into English by William Iones Gentleman* (London, 1594: repr. as *The English Experience*, no. 287, Amsterdam and New York, 1970), pp. Aiii, 17-18, 63, 68-9, 187; I have compared this translation with *Iusti Lipsii Politicorum sive civilis doctrinae libri sex* (Lyon, 1628); cf. J. H. M. Salmon, *Renaissance and Revolt: Essays in the Intellectual and Social History of Early Modern France* (Cambridge UP, 1987), 27-53, 119-35.

has been called a 'technology of authority'. There was necessary to a prince's state a 'civil prudence', consisting in the first place of an understanding of the people's 'motions and affections' and the limits of his ability to coerce them, and a 'military prudence', which means imposing a 'severe discipline' on citizen-soldiers in order to preserve the commonwealth from the miseries of civil war. Neo-stoicism put a public morality of ruler and subject in the place of an over-arching law as the foundation of the polity. Oestreich sees here the emergence of a modern image of the state 'based on order, power, unity, authority, discipline and obedience', which appealed to rulers on both sides of the religious divide because its ethics were not tied to any confession.<sup>59</sup>

Indisputably the turmoil of the religious wars bred an acceptance of the state, not as a piece of metaphysics or a legal construction but as a fact of political experience. The writings of Lipsius's admirer, the retired lawyer Michel de Montaigne, show this best of all because they are not political treatises but superb essays ranging over the whole field of human psychology and experience and revelling in the diversity of human nature. Tacitus is the most useful historian, Montaigne believes 'for a state troubled and sick (*estat trouble et malade*) as ours is at present', indeed 'you would often say that it is us he is depicting and stabbing at'. The agonizing question for the individual which Lipsius inserts at the end of his *Politics* seems to have been in Montaigne's mind throughout the 1570s and 1580s: can and ought a good man to stand aside from a civil war? The damage done to the country by the demands of religious conscience was obvious. The worst of the wars was that no obvious marks of language, manners, laws, or customs distinguished you from your enemy; when religion served as a pretext for a fight, your valet and your own relations could be on the other side and it was no use to fortify your house. 'In my neighbourhood, the prolonged licence of these civil wars has hardened us to a regimen (*une forme d'estat*) so evil that it's a veritable marvel that it survives.' No political evil, not even a tyrant's seizure of a state (*l'usurpation de la possession tyrannique d'un estat*), was worth treating with a medicine like that. In 'the present confusion of this state', Montaigne will not let his convictions attach him so firmly to one side that he cannot recognize the laudable qualities of the other. In the last of his one hundred and seven essays, 'On experience', a 'record of his life's endeavours [*essais*]' and a description of the cheerful philosophy they had brought him to at last,

<sup>59</sup> *Sixte Bookes of Politickes*, 25–6, 31, 59 ff., 67, 78–9, 145, 151, 158, 201, 202–5, 206; Giovanni Botero, *The Reason of State*, tr. P. J. and D. P. Waley (London, 1956); G. Oestreich, *Neostoicism and the Early Modern State*, ed. B. Oestreich and H. G. Koenigsberger, tr. D. McLintock (Cambridge UP, 1982); P. Burke, in *The Cambridge History of Political Thought, 1450–1700*, 491–2; M. Senellart, *Les Arts de gouverner: Du regimen medieval au concept de gouvernement* (Paris, 1995), 230–41.

he concludes that the finest lives are those lived after 'a common and human model, in an orderly way but without marvels or extravagances'. People must have a sense of right and wrong which is instilled by reason, though religion and laws ought to perfect and sanction it: no idea was more ruinous to the polity than that religious belief, without morality, would satisfy divine justice.<sup>60</sup>

The natural laws of the philosophers were too sublime and abstract to be of help, and no two countries could agree what they were. Indeed, Montaigne was sceptical about the ability of law of any sort to comprehend the infinite variety of human behaviour, and about the justice of French laws in particular, as he had seen them administered when he practised in the *parlement* of Bordeaux. He pitied the poor devils sacrificed to the forms of justice, and expressed unpopular doubts that Old Testament descriptions of witches could be applied to the detection of witches in his own time. If it was so difficult to establish ethical laws for a private individual, how was it possible to establish them for a multitude? 'The laws of conscience, which we say are born of nature, are born of custom'; and 'the laws maintain their credit, not because they are just, but because they are laws.' There was no other basis for their authority than custom and long use, which made it perilous to trace them back and find how disreputable their origins might be.<sup>61</sup>

Yet Montaigne's conclusion is that no good comes of changing traditional laws: he had seen the English do it three or four times in his lifetime, on matters of religion as well as politics, and in France, too, offences previously capital had been made lawful, and through the fortunes of war 'any one of us may be convicted of lèse-majesté against man and God' just for following the old laws. 'In public affairs there is no course so bad, provided that it is stable and traditional, that is not better than change and alteration.' Many French laws were barbarous: people were obliged to obey rules which they had never understood even in domestic affairs such as marriages, gifts, wills, and buying and selling. But the evil that could come from changing a traditional law outweighed the good, for a polity was like a building—moving one

<sup>60</sup> Montaigne, *Oeuvres Complètes*, ed. A. Thibaudet and M. Rat (Paris, 1962), 305 (On prayers), 346 (On conscience), 553 (Apology for Raymond Sebond), 600 (That difficulty increases our desire), 651 (On liberty of conscience), 768–70 (On what is useful and honourable), 919–20 (On the art of conversation), 929, 933 (On vanity), 989 (On restraining one's will), 1019, 1023, 1037 (On physiognomy); Oestreich, *Neostoicism and the Early Modern State*, 66 ff.; on Montaigne's politics, see P. Burke's *Montaigne* (Oxford UP: 'Past Masters', 1981) and his ch. on 'Tacitism, scepticism, and reason of state' in *The Cambridge History of Political Thought, 1450–1700*.

<sup>61</sup> Montaigne, *Oeuvres Complètes*, 114–15, 118 (On custom and not readily changing a traditional law), 562–4, 567 (Apology for Raymond Sebond), 638–9 (On presumption), 773 (On what is useful and honourable), 1008 (On the lame), 1041 (On physiognomy), 1049–50, 1056, 1088, 1096 (On experience).

block shook the whole. His fellow Frenchmen would know what he was talking about when he said that putting one's opinions above the public peace brought revolutions in the state (*mutations d'estat*) and civil war. Moreover, disputes about the best form of state, like those in Machiavelli's *Discourses* were ridiculous intellectual exercises; to wish for 'the government of the few in a popular state, or some other sort of government in a monarchy, is vice and folly'. Nothing oppressed a state like innovation; change provided the mould for injustice and tyranny.<sup>62</sup>

So, 'in the argument now convulsing France with civil wars, the best and sanest party is without doubt the one that stands by the ancient religion and polity of the country.' The king alone might be able to hold together 'the different parts and factions of our state'. Rule and subjection (*la maistrise et la subjection*) are naturally opposed, so Montaigne is not inclined to believe the case of either against the other as set out by two Scots he has been reading, 'the people's man' [George Buchanan], who puts the king below a carter, or his monarchist challenger [Adam Blackwood], who places him a few fathoms above God in sovereignty and power. Montaigne simply accepts the state and its laws as facts. States endure against the odds, though how they do it may be beyond our intelligence, and it has been known for great states (*des grands estats*) to be ruled by women, children, and lunatics equally as well as by capable princes.<sup>63</sup>

In Montaigne's essays 'state' is both the disturbed political condition of the whole commonwealth and the traditional forms of rule that may save it. This is also the state running through Jean de Serres' *Inventaire Général de l'Histoire de France* of 1597, which is addressed to all Frenchmen as having the principal interest in the state of their country, and asks how 'any State' in the difficulties theirs has been through can survive. The Catholic League's moves against Henry III are seen by de Serres as a 'coup d'État', a 'shaking of this State' which the majority of the nobility resisted; the three estates met in 1588 to hear proposals for 'the reformation of the State'; the execution of the Guises was the sort of measure which is necessary when 'the state is in peril'; and the Sorbonne's condemnation of the king was contrary to that college's laudable record of opposition to Rome's actions against 'the State of this Realm'.<sup>64</sup>

<sup>62</sup> Montaigne, *Oeuvres Complètes*, 116–19 (On custom and not readily changing a traditional law), 638–9 (On presumption), 651 (On liberty of conscience), 933–6 (On vanity).

<sup>63</sup> Ibid. 19 (Our emotions get carried away beyond us), 114, 117, 691 (On a monstrous child), 776–8 (On what is useful and honourable), 896 (On the disadvantage of high rank), 913 (On the art of conversation), 937.

<sup>64</sup> Jean de Serres, *Inventaire Général de l'Histoire de France Depuis Charles VIII iusques à Henri IV* (Lyon, 1653), ii. 820–1, 833–4, 846–7, 851–2; M. Yardeni, *La Conscience nationale en France pendant les Guerres de Religion* (Louvain, 1971), 17, 68–70.



Pierre Charron also wrote his *De la Sagesse* (first edition 1601) from experience of the religious wars and reached the same conclusion as his acquaintance Montaigne that the violent alteration of received laws was the chief political danger. It was 'one of the vanities and follies of men, to prescribe laws and rules that exceed the use and capacities of men' and, like Plato or Thomas More, to construct commonwealths which were mere 'castles in the air': a man should conform to the 'the laws and customs which he findeth established in the country where he is'. Charron's definition of 'the public state', as it appears in the translation quickly published in England by Samson Lennard, is: 'the Rule, dominion, or a certain ordering in commanding and obeying, is the prop, the cement, and the soul of human things; It is the bond of society, which cannot otherwise subsist; It is the vital spirit, whereby so many millions of men do breathe, and the whole nature of things.' But it is also the target of the hatreds of great and small, and liable to collapse through both 'hidden and unknown causes' and the 'wicked manners of sovereigns'. And the sovereignty that directs it can be seen both in Bodin's terms, as 'the power to give laws to all in general', but also (in the way Seneca and Tacitus described it) as a 'derogation from the common law' and comparable 'to fire, to the sea, to a wild beast'.<sup>65</sup> Charles Loyseau's *Treatise of Orders and Plain Dignities* (1610) more soberly describes how 'one general order is formed out of many orders, and of many estates a well-ordered state', though he too can use 'state' as a mere synonym for 'sovereignty'. 'Degrees of nobility [he writes] differ in accordance with the diversity of states or sovereignties (*Estats ou Souverainetez*) from which they depend': for example, in England the only estates are the high nobility and the common people, to judge by the constitution of parliament.<sup>66</sup>

#### THE ENGLISH 'COMMONWEALTH AND FREE STATE'

Sir Walter Raleigh thus represented accurately the alternative uses of 'State' in the early seventeenth century when he said in *The Prince; or, Maxims of State* (which, like Lennard's translation of Charron, was written for James I's son, Prince Henry, and must predate his death in 1612) that it means 'the frame or set order of a Common-wealth, or of the Governors that rule the same, especially of the chief and Sovereign Governor that commandeth the rest'. Raleigh certainly drew upon

<sup>65</sup> Pierre Charron, *De la Sagesse trois Livres*, 3rd edn. (Paris, 1607), 266; *Of Wisdome Three Books Written in French by Peter Charron*, tr. Samson Lennard (London, before 1612), 189–91, 197 (Bk.1, caps. 49, 51).

<sup>66</sup> *Les Oeuvres de Maistre Charles Loyseau* (Lyon, 1707), 1, 33; cf. Loyseau, *A Treatise of Orders and Plain Dignities*, ed. Howell A. Lloyd (Cambridge UP, 1994), 5–6, 117.

Charron, and the numerous translations of French works show how the political speculations of the period of religious wars were found relevant to England's condition, as similar tensions increased towards the breaking-point of the English civil war. But Raleigh's 'five points' in which the 'State or Sovereignty consisteth' are very like those of Sir Thomas Smith in *De Republica Anglorum* (the first of them the 'Making and annulling of laws'); and his juxtaposing of this 'state of the governor' to 'the state of the commonwealth' may reflect not French ideas but the actual tension between the royal law-maker and a parliament beginning to stand against the king in defence of 'the ancient constitution and the common law' of the English people.<sup>67</sup>

Raleigh's nemesis, King James VI and I, was king of Scotland for thirty-five years before he inherited Elizabeth's throne in 1603, and suffered from the 'infamous invectives' of John Knox and George Buchanan, whose chronicles he saw as justifying popular rebellion and the deposition of his own mother. His encounters with the Presbyterian kirk bred in him a fear of 'Puritans, very pests in the Church and commonweal of Scotland', who preferred 'holy wars to an ungodly peace': the sectaries he would describe to his first parliament in England as not so far differing 'from us in Points of Religion, as in their confused Form of Policy, and Parity [of ministers]; being ever discontented with the present Government, and impatient to suffer any Superiority'. But even more than the 'new Puritanical strains, that make all things popular' he detested the Jesuits 'who are nothing but Puritan-Papists'; and he expressed his horror of 'the superstitious rebellion of the [French] Leaguers', and the claim that the pope had 'an Imperial Civil Power over all Kings and Emperors', so that the murder of kings deemed heretical was no sin but rather 'matter of salvation'.<sup>68</sup>

In reaction to the sectarian threat and (it is likely) with the help of Bodin's works, James developed an ideology of 'free and absolute monarchy' and expressed it in vigorous tracts, which gave the speaker of the English Commons in 1604 reason to accord him 'Precedence before all other Princes in divine and moral literature'. His *Daemonologie* (1597) culminates in a Bodinian insistence that witches must be punished as enemies of divine and civil order. His *Trew Law of Free Monarchies* (1598), which aims to lay down the grounds of political

<sup>67</sup> *Remains of Sir Walter Raleigh* (London, 1664), 1–2; E. A. Strathmann, *Sir Walter Raleigh: A Study in Elizabethan Skepticism* (New York: Columbia UP, 1951), 137–8, 232–3; J. H. M. Salmon, *The French Religious Wars in English Political Thought* (Oxford: Clarendon Press, 1959).

<sup>68</sup> *King James VI and I: Political Writings*, ed. J. P. Sommerville (Cambridge UP, 1994), 6, 46, 82, 89, 138, 218–19; Salmon, *The French Religious Wars in English Political Thought*, 71, 79; R. A. Mason, 'George Buchanan, James VI, and the Presbyterians', in *Scots and Britons: Scottish Political Thought and the Union of 1603*, ed. R. A. Mason (Cambridge UP, 1994); Burns, *The True Law of Kingship*, 188, 206, 218, 222, 241, 245–6.

duty 'without wasting time upon refuting the adversaries', and *Basilicon Doron* (first printed in 1599), which turns scholastic principles into practical advice for Prince Henry, his 'natural successor', preach that monarchy is a 'form of government resembling the divinity' and that monarchs are accountable only to God. Churchmen must not be allowed 'to meddle with the policy or estate in the pulpit', or meet in conventions without the prince's permission.<sup>69</sup>

James recognized a 'fundamental and civil law' of Scotland defining the king's hereditary right and authority, but he claimed that it was King Fergus coming over from Ireland who established this 'estate and form of government' among a people who were still barbarous. 'So the truth is directly contrary in our state to the false affirmations of such seditious writers, as would persuade us, that the Laws and state of our country were established before the admitting of a king . . . The kings therefore in Scotland were before any estates or ranks of men within the same, before any Parliaments were holden, or laws made', and they distributed land and 'erected and decerned' estates without a parliament's advice.<sup>70</sup> For the proposition that the king is the author of laws, not laws of the king, James VI might have cited, instead of the mythical King Fergus, the example of the first King James of Scotland, who had returned in 1424 from an eighteen-year captivity in England to cure what the contemporary Scottish chronicler and royal minister, Walter Bower, calls 'the instability of the state of this realm'; Lord Stair, writer in the late seventeenth century of the authoritative *Institutions of the Law of Scotland*, believed that the laws James I made for the hearing of bills of complaint, using the understanding he had gained of 'the course of justice in both these kingdoms', was the effective beginning of the Scottish high court, the Court of Session. For James VI, at any rate, the king was above the law, though he would delight to conform his own actions to the laws he made. Prince Henry was advised to call parliaments only when new laws were absolutely necessary, and he should watch out for the common people's continual 'wearying of the present estate' and desire for novelties, for a few well-executed laws 'are best in a well ruled commonweal' (here echoing Queen Elizabeth's address to her parliament in 1586).<sup>71</sup>

<sup>69</sup> Cf. i. 148; *King James VI and I: Political Writings*, 62–4, 82; Burns, *The True Law of Kingship*, 232, 234, 240, 246, 284–5; on the political bearing of witch beliefs, see Bodin's *De Magorum Daemonomania Libri IV* (Basle, 1581), bk. 4, cap. 1; James VI of Scotland, *Daemonologie* (Edinburgh, 1597; repr. London, 1924), 77–81; C. Lerner, *Enemies of God: The Witch-hunt in Scotland* (Oxford: Blackwell, 1981), 198; S. Clark, *Thinking with Demons: The Idea of Witchcraft in Early Modern Europe* (Oxford: Clarendon Press, 1997), 670–9;

<sup>70</sup> *King James VI and I: Political Writings*, 21, 25, 29–30, 65, 72–5; *Journal of the House of Lords [LJ]*, ii. 117; Burns, *The True Law of Kingship*, 235, 237, 241, 247, 250–1, 286, 288.

<sup>71</sup> *Scotichronicon* by Walter Bower, general ed. D. E. R. Watt, viii (Aberdeen UP, 1987), 216–17; James, Viscount Stair, *The Institutions of the Law of Scotland*, ed. D. M. Walker

The importance of this emphasis on legislative sovereignty appeared when James added the English to his Scottish crown, and attempted (like the legendary Fergus!) to forge a new state, this time by uniting the laws of two kingdoms. In the new address 'to the reader' prefaced to *Basilicon Doron* in 1603, James tactfully declined to discuss any sicknesses there might be in 'the state of England, as a matter wherein I never had experience'; his 'blood and descent' proclaimed his interest 'in the prosperity of that state', but he would not meddle in the government of the lawful queen who presently ruled over it, who (he did not doubt) was as zealous to purge 'any corruptions stollen in her state' as good subjects were to inform her of them. If by 'state' here he meant 'regime', James found himself after 1603 having to work with a parliament possessing a high view of its responsibility to devise 'good and necessary laws' for 'the whole State of the Commonwealth in general', as Speaker Popham had told Elizabeth in 1581; laws including in that particular year an act to bridle the enemies of the 'most royal Person, State and Government' of the Queen.<sup>72</sup>

In January 1604 James informed the Scots that he intended to make of the twin kingdoms, already joined together in him as single head, a 'sincere and perfect union', wherein they should 'love one another as no more two but one estate'. In March, in the first of the long speeches to the English parliament which became a feature of his reign, after expressing his thanks to 'the whole State', 'the whole Body of this Kingdom', for the readiness with which he had been received in the place which God had granted him, he obtained the appointment of a commission to prepare, along with Scottish delegates, a legal union of the two realms. James was supported in his preaching of the benefits and possibility of such a union by a great Scottish jurist, Sir Thomas Craig, who argued in his *De Unione Regnorum Britanniae* that Britain had always needed a single *imperium* to save its 'state' from catastrophe; it was a natural *Civitas* or *Corpus Reipublicae* (body of a commonwealth), whose laws might, with the consent of both peoples, be fused into one, since they had a common basis in the Saxon kings' peace and the feudal laws and charters of the Normans.<sup>73</sup>

But James I's latter-day attempt to create a new monarchical state by

(Edinburgh and Glasgow UPs, 779, 784, 815–16; *King James VI and I: Political Writings*, 21–2, 25, 29–30.

<sup>72</sup> *Political Writings*, 11; CJ i. 137; B. P. Levack, 'Law, sovereignty and the union', in *Scots and Britons*; Burns, *The True Law of Kingship*, 255 ff.

<sup>73</sup> Burns, *ibid.* 262; *King James VI and I: Political Writings*, 132–46; Sir Thomas Craig, *De Unione Regnorum Britanniae Tractatus*, ed. and tr. C. Sanford Terry (Edinburgh: Scottish History Society, 1909), 3, 14, 15, 18, 19, 26, 89–90, 209, 227, 231, 233, 241, 327–8; J. W. Cairns, T. D. Fergus, and H. L. MacQueen on John Skene and Thomas Craig, in *Humanism in Renaissance Scotland*, ed. J. MacQueen (Edinburgh UP, 1990).

the fusion of laws foundered on the attachment of both nations to their fundamental laws and customs. The speaker of the House of Commons in 1604 replied to the king at equally unprecedented length, first praying for his majesty's renown, the advance of religion, and the security of the king's 'State and People' from 'Popes Cursings', then expatiating on the laws which were the life of the body politic and framed according to the nature of the people, so that England's differed from 'the Laws of other States Government' and could not be assimilated. The king, the speaker went on, could not govern 'the whole Estate' without the help of a senate, a 'council of estate', which 'ought to know the Law, the Liberties, the Customs, the Use, and Discipline, wherewith the State is governed'. The stream of tracts produced in 1603–5 on ways of uniting 'states and kingdoms' often worried about the effect on 'estate inward or matter of law', for Aristotle had taught that no laws were ever altered 'without great danger of the eversion of the whole state'. The adoption of the style 'King of Great Britain' was resisted precisely because it could be taken to enact 'a new kingdom or estate', abrogate existing English and Scottish laws and threaten the legislative powers of both parliaments, since only the king would be able to make law for the whole island. There could be no true union without 'a meeting of both states' in a common parliament, such as the Swiss cantons had established alongside the parliaments of 'every estate particular'.<sup>74</sup>

Though its durability proved the 'Union of the Crowns' a considerable political success,<sup>75</sup> James's ambition to make a more perfect union of laws and institutions opened an ideological gap between king and parliament in their conception of the state. The king rejoiced before parliament in 1605 at the frustration of the Gunpowder Plot against himself and 'the whole Body of the State in general', and the consequent salvation of the 'whole Commonwealth' and of parliament 'as being the Representative Body of the State', but then reverted to his favourite theme, that kings were God's lieutenants on earth, indeed called Gods 'in the Word of God itself'. In further speeches to parliament in 1607, 1610, and 1614, he repeated his desire for 'a perfect Union of Laws and persons, and such a Naturalizing [of his Scottish subjects in English law] as may make one body of both kingdoms'. He was resolved to govern England 'according to the ancient form of this State, and the Laws of this Kingdom', and had no intention, as it was rumoured, to replace the Common Law by Civil Law. But English laws were too intricate and

<sup>74</sup> Cf. i. 146–8, 254–5; *The Jacobean Union: Six Tracts of 1604*, ed. B. R. Galloway and B. P. Levack (Edinburgh: Scottish History Society, 1985), pp. xvi–xxvii, xxxv, xxxvii, xxxviii, xlii, xliii, 64, 92, 146–7, 185, 189, 217; Burns, *The True Law of Kingship*, 262–5.

<sup>75</sup> C. Russell, 'The Anglo-Scottish Union 1603–1643: a success?', in *Religion, Culture and Society in Early Modern Britain: Essays in Honour of Patrick Collinson*, ed. A. Fletcher and P. Roberts (Cambridge UP, 1994).

needed to be made 'more certain'. If any law was not convenient, let parliament amend it, but in the mean time do not call it a grievance, 'for to be grieved with the Law, is to be grieved with the King'. The 'State of Monarchy' was the 'supremest thing on earth', and the king in a settled kingdom was *lex loquens* (the voice of law). The chief purpose of parliaments, which in England were too long, was to relieve *his* 'state and necessities', for 'if the King want, the State wants . . . and woe be to him that divides the weal of the King from the weal of the kingdom'. 'The will of the King and of the State' could not be 'disjoined'.<sup>76</sup>

Later in the reign, the king's tone became more strident. Addressing the judges in Star Chamber in 1616, James complained of the busy-body justices of the peace, and another sort of gentlemen 'who cannot be content with the present form of Government, but must have a kind of liberty in the people . . . and in every cause that concerns Prerogative, give a snatch against a Monarchy, through their Puritanical itching after Popularity'. In 1621–2, a parliament which presumed to discuss such 'mysteries of state' as the projected marriage of Prince Charles to a Spanish princess, saw itself dissolved, the Commons' Protestation of its right to free speech torn from the Journal, and a Declaration issued by the king that the Protestation attacked his 'Crown and State' and invaded the prerogatives that were 'the very marks and Characters of Monarchy and Sovereignty'; the Commons should remember that the liberties they dared to claim as their 'ancient and undoubted right and inheritance' had in fact been 'granted unto them by the grace and favour of Our Predecessors'.<sup>77</sup>

In the constitutional arguments of James I's reign, '(e)state' in its various meanings can be seen playing a leading part. By the final session of the first Stuart parliament in 1610, Lord Chancellor Ellesmere was already saying that 'in this present state', the 'popular state', represented by the Commons, was growing so 'big and audacious' against the other two estates in parliament through its questioning of the Union and of the imposition of taxes that, if it 'be suffered to usurp and encroach too far upon the regality, it will not cease until it break out into democracy'.<sup>78</sup> But Ellesmere's other worry, that the lower House, though not a court of record, was presuming to examine judgments in courts of law, along with the encounters of 1616 and 1621–2, shows that the main challenge to the monarchical state of the Stuart kings did not come

<sup>76</sup> LJ ii. 357; *King James VI and I: Political Writings*, pp. xxiv, xxviii, 161–2, 167, 172–4, 180–6, 195; *Historical MSS Commission Report on the Manuscripts of Reginald Rawdon Hastings*, iv, ed. F. Bickley (London, 1947), 230–6, 239–40; Burns, *The True Law of Monarchy*, 276–7.

<sup>77</sup> *King James VI and I: Political Writings*, 222, 258, 261–3, 266.

<sup>78</sup> *Proceedings in the Parliament of 1610*, ed. E. R. Foster, 2 vols. (Yale UP, 1966), i. 276–83.

from Aristotelian ideas of the 'popular state', rather from the 'state of the commonwealth' defined by English Law: a law belonging to the whole people, which William Lambarde was tracing back to Anglo-Saxon antiquity, and which Chief Justice Coke, in the footsteps of Christopher St. German, was blowing up into an 'artificial reason' declared by the courts. In the making of law English parliaments generally worked in harmony with monarchs whose will they recognized as necessary to give new laws their force. The conflict that arose was about who should interpret the law, and whether it was a necessary attribute of monarchy (as Aquinas had argued) to be able to dispense with the law altogether in an emergency. In his Star Chamber speech, James repeated that he had never meant to change English law, and indeed 'in matter of Policy and State' innovation always changed things maturely established for the worse. But he showed his resentment of the 'foolish quirk' of the judges who had advised that Scotland and England could not be united by the name of Great Britain, for he had since learnt that there was nothing an Act of Parliament could not do. And he insisted that the Common Law must keep 'within her own limits, not derogating' from the 'Law of God and his Church', and the 'Law Civil and Canon'. The judges must remember that they were only interpreters of law they did not make, and they must not encroach on his prerogative to define the boundaries of his courts and keep them 'in musical accord': warnings directed specifically against Coke, whose campaign to assert the supremacy of the Common Law courts over the the Court of Chancery, Star Chamber, and the ecclesiastical courts, was about to bring his dismissal from the office of Chief Justice.<sup>79</sup>

Opportunity for constitutional conflict was increased when Coke, who had been speaker of the Commons in an Elizabethan parliament, returned to the House, helped to revive the process of impeachment of the king's ministers in 'the high court of parliament', and promoted a Monopolies Act which 'declared' that patents of monopoly were 'against the laws of the realm'. In 1628, as he completed in his late seventies the second part of his famous *Institutes of the Law of England* expounding the great succession of statutes from Magna Carta onwards, he promoted in Charles I's third parliament the momentous Petition of Right, which declared that the liberties, not just of the Commons but of all freemen, were indeed, 'by the common law and statutes', inherited property rights. It followed that they were a matter for the courts to determine, and that it was particularly for parliament

<sup>79</sup> *King James VI and I: Political Writings*, 207 ff.; C. C. Weston, 'England: Ancient Constitution and Common Law', in *The Cambridge History of Political Thought, 1450-1700*, 374 ff.; A. Cromartie, 'The Constitutionalist Revolution: the Transformation of Political Culture in Early Stuart England', *Past and Present*, 163 (1999), 76-120.

as both legislature and high court to hold the king to the letter of his grants.<sup>80</sup> Immediately controversial was freedom from impositions which the Commons had not consented to, such as the customs duties the Court of the Exchequer had decided in *Bate's Case* (1606) that the king could impose by his 'absolute power', since this was 'material matter of state, and ought to be ruled by the rules of policy', as against those of law.<sup>81</sup> Though Charles gave his assent to the Petition of Right (and at parliament's insistence, in his own person), his denial that it covered the excise duties called tunnage and poundage began a bitter and long-running dispute. Sir Robert Berkeley, in 1638 the leader of the judges in declaring that Charles's levying of ship money was not (as John Hampden's counsel argued) against 'a fundamental policy in the creation of the frame of this kingdom', since the first maxim of the law of England entrusted the king with the care of 'the state of the commonwealth', found himself in 1641 impeached and imprisoned by the Long Parliament 'for endeavouring to subvert the fundamental laws'.<sup>82</sup>

The outbreak of civil war in 1642 was caused by religious panic, not a disagreement about the 'fundamental laws', to the idea of which everyone paid lip-service. Yet the idealization, gathering pace after 1603, of the laws and customs of England as the possession of the people and the mainstay of the commonwealth, provided a basis of legitimacy to those who opposed the king out of religious conscience, as similar ideas had done in Huguenot France. Even the emergency powers invested in the king by 'reason of state' could be brought under the law and their exercise judged by a parliament claiming that it had the guardianship of the 'whole state of the commonwealth'. At this point government without a king at all became imaginable, though no one sought it until the Commons lost all trust in Charles the man and in January 1649 brought him to trial and execution. They then abolished the office of king on the grounds that 'usually and naturally any one person in such power makes it his interest to incroach upon the just freedom and liberty of the people, and to promote the setting up of their own will and power above the laws'; and abolished along with it the House of Lords, which they found by long experience 'useless and dangerous to the people of England'.<sup>83</sup>

<sup>80</sup> *The Constitutional Documents of the Puritan Revolution 1625-1660*, ed. S. R. Gardiner, 3rd edn. (Oxford: Clarendon Press, 1906), 65 ff.; Cromartie, 'The Constitutionalist Revolution', 102 ff.

<sup>81</sup> T. B. Howell, *A Complete Collection of State Trials to 1783*, 2nd edn. (London, 1816-26), ii. 382-94; Cromartie, 'The Constitutionalist Revolution', 94.

<sup>82</sup> *Constitutional Documents of the Puritan Revolution*, 115 ff., 189-92, 245-7, 248-9, 254-8.

<sup>83</sup> On parliamentary discussion of 'reason of state' see C. Russell, *Parliaments and English*



In his *Tenure of Kings and Magistrates*, published a fortnight after the king's execution, John Milton asserted that the king had been found by his own subjects 'an alien, a rebel to Law, and enemy to the State'; since 1581, when 'the States of Holland' had abjured obedience to the tyrannous king of Spain, 'no State or Kingdom in the world hath equally prospered'; a 'Protestant State' should now be proud of having destroyed a wicked prince who had threatened its laws and its religion. In another few weeks the Commons made the resounding declaration that 'the people of England, and of all the dominions and territories thereunto belonging', constituted a 'Commonwealth and Free State', which should 'from henceforth be governed as a Commonwealth and Free State by the supreme authority of this nation, the representatives of the people in Parliament'—a parliament which with the destruction of the estates of king and lords had itself been reduced to one estate.<sup>84</sup>

*Politics* (Oxford: Clarendon Press, 1979), 93, 370, and Cromartie, 'The Constitutionalist Revolution', 96–7, 111; *Constitutional Documents of the Puritan Revolution*, ed. Gardiner, 380–8.

<sup>84</sup> John Milton, *Political Writings*, ed. M. Dzelzainis (Cambridge UP, 1991), 26, 28, 33, 45; *Constitutional Documents of the Puritan Revolution*, 388.

## Conclusion: Law and the State in History

THE COMBATANTS in the ideological battles of the early seventeenth century shared the assumption that states and laws came into existence together. In the new edition of Fortescue's *De Laudibus Legum Anglie* which he prepared in 1616, John Selden ridiculed Coke's assertion of the unrivalled antiquity and consequent excellence of English law. The answer to the 'trivial demand, *When and how began your common laws?*', Selden wrote, was 'when and in like kind as the laws of all other States, that is, *When there was first a State in that land, which the common law now governs*: then were natural laws limited for the conveniency of civil society here, and these limitations have been from thence, increased, altered, interpreted, and brought to what they are; although perhaps . . . they are not otherwise than the ship, that by often mending had no piece of the first materials . . . which yet (by the Civil law) is to be accounted the same still.'<sup>1</sup>

Selden's State appears to be a civil society which is at least conceptually prior to the laws governing it: this book has presented it rather as the laws and legal institutions themselves, which were the things first perceived as having an ordered state. The word 'state' has been found in common use in the middle ages to mean both legal order in a country and the position of individuals or 'estates' of people within that order, and 'the state of the king and the kingdom' has appeared as the formula translating a legal into a political relationship. The concept of the state was not the bloodless abstraction of philosophers standing apart from affairs and judging constitutions with hindsight, but the working idea of rulers and administrators coping with the realities of the present: an idea of the condition of the kingdom that needed 'reform for the better' in order to survive times of war and social upheaval. Laws were understood to be 'the life of the body politic', as the king was the head and the subjects the trunk—the ever-changing life of a body which (in the terms of Selden's metaphor) remained the same organism though every

<sup>1</sup> Sir John Fortescue, *De Laudibus Legum Angliae*, ed. and tr. S. B. Chrimes (Cambridge UP, 1942), 15–18; cf. J. W. Tubbs, *The Common Law Mind: Medieval and Modern Conceptions* (Baltimore and London: Johns Hopkins UP, 2000), 141–7.

part of it was replaced. It was because the common laws of England and Scotland had led different lives that they turned out not to be capable of fusion as James VI and I desired.<sup>2</sup>

For political thought the renaissance of humanist ideas may be considered less important than the longer and more continuous development of a public culture based on the administration of justice. From this there emerged at the end of the middle ages the notion that there were 'fundamental laws' of a polity, the chief of which for James VI was the responsibility of the king to establish 'the estate and form of government' in Scotland, and to maintain, in accordance with his coronation oath, 'the whole country, and every state therein, in all their ancient Privileges and Liberties, as well against all foreign enemies, as among themselves'. When king of Great Britain, James must have been encouraged in 1614 to receive a report from his ambassador in Paris of an article proposed for the *cabier* of the Third Estate in the French Estates General. This wanted it declared and taught by the clergy 'pour loi fondamentale de l'estat' that no one (in particular, not the Jesuits) had power to dispense Frenchmen from their fidelity to the king, or (in a more theoretical version of the article) that the king be recognized as 'souverain en son état, ne tenant sa couronne que de Dieu seul'.<sup>3</sup>

The work in which Thomas Hobbes presented, two years after the execution of Charles I, the bleak but lasting image of 'that great Leviathan called a Commonwealth, or State, in Latin Civitas', took its urgency from the same fear of the destructive clash of religious sects that motivated the Third Estate's article of 1614, and the writings of Bodin, Montaigne, and King James. But Hobbes's science of politics aimed to transcend both Machiavelli's lessons from history and Bodin's moralism. The only fundamental law Hobbes could observe was the natural law of self-preservation, which compelled men trapped in the State of Nature in a 'war of every man against every man' to agree to grant unconditionally to a 'common power' (it might be one man or an assembly of men) a sovereignty which he followed Bodin in insisting must be absolute and undivided; without this sovereign power, a commonwealth was 'but a word without substance' and could not stand. An early work of Hobbes on the *Elements of Law, Natural and Politic* argued that the need was for an absolute sovereign to make and

<sup>2</sup> J. G. A. Pocock, 'Two kingdoms and three histories? Political thought in British contexts', in *Scots and Britons: Scottish political thought and the union of 1603* (Cambridge UP, 1994), 304 ff.

<sup>3</sup> *King James VI and I: Political Writings*, ed. J. P. Sommerville (Cambridge UP, 1994), 65, 73; E. W. Nelson, 'Defining the Fundamental Laws of France: The Proposed First Article of the Third Estate at the French Estates General of 1614', *EHR* 115 (2000), 1216–30.

sanction the civil laws which must replace inevitably conflicting private judgments with a common measure of what was 'right or wrong, profitable or unprofitable, virtuous or vicious'. A quarter of a century later, in *A Dialogue of the Common Laws of England*, he sought to demonstrate that in the English state neither the reason of individuals nor Coke's artificial reason of the courts in fact decided what was right or wrong, but only 'the Reason of him that hath the Sovereign Power', so that even judgments made on the basis of legal precedent stood only insofar as the king allowed them.<sup>4</sup>

Like Montaigne, Hobbes accepted and justified the power of the state as the only antidote to the chaos created by representatives of the people who claimed that 'every private man is judge of good and evil actions' and that 'whatsoever a man does against his conscience is sin'. At the risk of condemnation as an atheist, Hobbes spent half of *Leviathan* proving that religion had nothing to say about how the commonwealth should be ruled. Only the Old Testament kingdom of the Jews could be called properly 'the kingdom of God', because He gave laws to it directly through Moses. No superior authority existed which could direct states in legislating for their own peoples—or restrain them in their behaviour to each other: the jealousies and aggression between different 'kings and persons of sovereign authority' was for Hobbes an intractable case of a state of nature, and it was left to Grotius and Pufendorf to attempt to lay the foundations of a law for an international society of states.<sup>5</sup>

Yet, if the state ceased for Hobbes to be an ideal of order and became a calculation of the power needed to preserve a civil society in existence, the metaphysical entity born in the middle ages as 'the state of the king and the kingdom' was now indestructible. It was not fundamentally a concentration of power hardened in war with other powers, but a country's internal peace and order understood as a microcosm of an ordered universe. Hegel believed that society was held together by 'the fundamental sense of order which everybody possesses', and called the State 'mind on earth' and 'the march of God in the world', though he too thought an actual state originated in 'domination on

<sup>4</sup> Thomas Hobbes, *Leviathan*, ed. M. Oakeshott (Oxford: Blackwell, 1946), 5 (Introduction), 161–2 (II. 24), 188 (II. 27), 211–14 (II. 29), 448 (IV. 46), 460–8 (Review and Conclusion); *De Corpore Politico, or the Elements of Law*, in *The English Works of Thomas Hobbes*, ed. Sir William Molesworth, iv (London, 1840), 225 (II. 10. 8); *ibid.* 414 ('Considerations upon the Reputation of T. Hobbes'); *A Dialogue between a Philosopher and a Student of the Common Laws of England*, ed. J. Cropsey (U. of Chicago P, 1971), 55 ff.; *The Cambridge History of Political Thought, 1450–1700*, 224–5, 227, 435.

<sup>5</sup> *Leviathan*, 75, (I. 12), 83 (I. 13), 84–5 (I. 14), 104–5 (I. 16); 172–89 (II. 26), 232–41 (II. 31), 452–3 (IV. 47) 461, 466 (Review and Conclusion); *Elements of Law*, 170 (II. 6.2); *The Cambridge History of Political Thought, 1450–1700*, 515–16, 538, 586.

the one hand, instinctive obedience on the other' and was 'a connection of wills' made by 'obedience and force, fear of a ruler'.<sup>6</sup>

The essence of the Modern State might be better described as an unresolvable tension between government and people, the politics of which have grown out of the making and challenging of laws as they developed in the middle ages. In England, the killing of the king in 1649 and the replacement of King James's 'free monarchy' by a 'Commonwealth and Free State' governed by 'the representatives of the people in Parliament' still left an ineradicable ambiguity in the concept of the State (was it the frame of the commonwealth or the governors who ruled it?), because neither the coercive quality of sovereign power nor challenges to its legitimacy disappeared with its formal vesting in the people. In their tracts and debates the Levellers, drawn from the soldiers of the parliamentary army and the people of London, immediately denied the claim made by 'those men that now sit at Westminster' in their *Declaration for a Free State* that they were the true parliament of England. The state the Levellers wanted but did not think that the new Presbyterian establishment would give them was one in which every man, of whatever religious persuasion, was 'free in the state he lives in and is obedient to—matters of opinion being not properly to be taken into cognisance any further than they break out into some disturbance or disquiet to the state'; one also in which the absence of an estate worth 40s. a year should not deprive him of his birthright of a vote in the election of his representatives—the way in which 'the state and the Army' were going. The Commons must listen to the people if they really wished to 'make this nation a state free from the oppressions of kings and the corruptions of the court'.<sup>7</sup>

The Levellers demanded for 'that famous and worthy sufferer for his country's freedoms, Lieutenant-Colonel John Lilburne', 'illegally' imprisoned by Parliament, the right accorded by Magna Carta to trial by his peers. But generally they regarded the Common Law as a product of a 'Norman Yoke' imposed on the English people by William the Conqueror and serving only the wealthy professional lawyers, and wanted 'a new and equal Representative' to make laws which 'ought to be equal' and 'not evidently destructive to the safety and well-being of the people'. A Leveller tract called *Vox Plebis* (the voice of the people), remarked that 'All States in the beginning are venerable', but that a republic which would avoid ruin must above all 'keep their religion

<sup>6</sup> Hegel's *Philosophy of Right*, tr. with notes by T. M. Knox (Oxford: Clarendon Press, 1952), 279; id., *Reason in History*, tr. R. S. Hartman (Indianapolis, 1953), 60.

<sup>7</sup> *The English Levellers*, ed. A. Sharp (Cambridge UP, 1998), 17–19, 106, 196; *The Cambridge History of Political Thought, 1450–1700*, 423, 442; S. D. Glover, 'Putney Debates: Popular versus Elitist Republicanism', *Past and Present*, 164 (1999), 78.

uncorrupted, and their Laws from violation'; and at the same time declared it 'a most sure Rule in State policy, That all the Laws that are made in favour of liberty, spring first from the disagreement of the people with their Governors'.<sup>8</sup>

<sup>8</sup> *The English Levellers*, 33, 48, 95, 197; G. Burgess, *The Politics of the Ancient Constitution: An Introduction to English Political Thought 1603–1642* (London, 1992), 90–3, 226–9; Glover, 'Putney Debates', 63 ff.

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